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ABSTRACT

This report presents findings of a commission that held hearings and examined quantitative and qualitative evidence on the current state of worker-management relations in the United States. Chapter I identifies those facts about the changing economic and social environment that bear directly on the mission statement of the commission (to ensure that workers and managers work together more effectively) and highlight the challenges these facts pose for existing workplace practices, worker-management relations, and labor regulations. Chapter II reviews the facts with respect to employee participation and labor-management cooperation. Sections report on the following: views of workers, managers, and labor leaders; the extent of employee involvement; the issues addressed in these processes; the evidence on their effects on economic outcomes; their prospects for diffusion; and the legal issues they raise. Part A of Chapter III focuses on how effectively the National Labor Relations Act (NLRA) works in providing workers the free choice whether or not to bargain collectively with their employers. Part B considers workers not covered by the NLRA, including contingent workers, the construction sector, and workers in the railroad and airline industries covered by the Railway Labor Act. Chapter IV examines employment regulation, litigation, and dispute resolution. Appendixes include historical perspectives on the work of the commission and its national and regional meetings. (YLB)

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FACT FINDING REPORT

COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

MAY 1994

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Commission on the Future of Worker-Management Relations

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---

[*] Ceased to be active upon his nomination to be a member and Chairman of the National Labor Relations Board and resigned on March 12, 1993.

[**] Appointed to the Commission on November 1, 1993.

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

May 1994

The Honorable Robert B. Reich
Secretary of Labor
Washington, D.C. 20210

Dear Secretary Reich:

The Commission on the Future of Worker-Management Relations that you appointed on behalf of the President presents its Fact Finding Report. This report is designed to facilitate the policy discourse to follow and to encourage some degree of consensus on the issues raised by your Mission Statement that defined our task.

Sincerely,

John T. Dunlop

John T. Dunlop, Chair
Commission on the Future of
Worker-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY
WASHINGTON, D.C.
20210

May 1994

The Honorable Ronald H. Brown
Secretary of Commerce
Washington, D.C. 20230

Dear Secretary Brown:

The Commission on the Future of Worker-Management Relations that you appointed on behalf of the President presents its Fact Finding Report. This report is designed to facilitate the policy discourse to follow and to encourage some degree of consensus on the issues raised by your Mission Statement that defined our task.

Sincerely,

John T. Dunlop

John T. Dunlop, Chair
Commission on the Future of
Worker-Management Relations

PREFACE

The Commission on the Future of Worker-Management Relations was announced by Secretary of Labor Robert B. Reich and Secretary of Commerce Ronald H. Brown on March 24, 1993.*

The Mission Statement of the Commission states as follows:

"The future living standards of our nation's people, as well as the competitiveness of the United States, depend largely on the one national resource uniquely rooted within our borders: our people -- their education and skills, and their capabilities to work together productively."

The President's economic plan lays a new foundation for the education and training of the nation's work force. But even a work force that is well prepared for the jobs of the future will fail to adequately improve the nation's productivity and living standards unless workers and managers work together more effectively. Both parties must take on new responsibilities.

To this end, the President has asked the Secretary of Labor and the Secretary of Commerce to form a Commission on the Future of Worker-Management Relations. The Commission will investigate the current state of worker-management relations in the United States and report back to the Secretaries in response to the following questions:

"1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?

2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?

3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?"

---

* The Federal Register of May 7, 1993, carried notice of the establishment of the Commission as well as notice of the first meeting on May 24, 1993. The Commission is to serve solely as an advisory body in accordance with the Federal Advisory Committee Act.

This Fact Finding Report is submitted jointly to the Secretaries of Labor and Commerce. After release of this Report, the Commission plans a series of hearings and conferences with representatives of business organizations, labor organizations, other organizations that have presented testimony or statements, and the interested public to receive comments, reactions and suggestions as to the statement of facts and its implications for private and public policies and for the recommendations of the Commission. Within a period of six months of the presentation of this Report, the Commission plans to present a final report with recommendations to the two Secretaries. (Department of Labor Press Release, February 10, 1994).

The Commission has held 11 national hearings in Washington, D.C., and working parties of three to five Commission members have held regional hearings in six communities - Louisville, East Lansing, Boston, Atlanta, San Jose and Houston. (The agenda of each of these sessions is included in Appendix B with the subjects under discussion and the invited participants.)

In each of the regional hearings several hours or more were set aside to hear individuals or representatives of organizations who requested an opportunity to appear and to testify on any subject within the scope of the Commission's Mission Statement. If time was inadequate to hear all who requested to testify, in a few cases, written statements were received and distributed to all Commission members, and these statements are a part of the public record of the Commission. The Commission appreciates the assistance of various organizations that helped to organize and facilitated these regional hearings.

A total of 134 persons testified before the Commission in its 11 hearings in Washington, D.C., and 220 persons testified in the six regional hearings, for a total of 354 witnesses.

The transcripts of the 11 national Commission hearings run to 2,125 pages, and the transcripts of the six regional hearings run to 1,733 pages, for a total of 3,858 pages.

The Commission has also received scores of exhibits, letters, papers, articles and studies that have been made a part of its public record.

The Commission examined a wide variety of quantitative and qualitative evidence, some of which was presented to it in testimony or offered to it by interested parties, and some of which is part of published data and the scholarly literature. In some instances, the evidence is more or less definitive, based upon statistically valid surveys whose results have been replicated in many studies, or administrative records. In other cases, the evidence is weaker, based on short reports by participants relating their own experiences, or on limited surveys that can at best scratch the surface of complex issues. On the general presumption that it is better to have some, occasionally weak, evidence than no evidence, the Commission has sought to make use of all of this information, albeit weighing the different forms of evidence.

The Commission has encouraged four groups of studies by other organizations that constitute new data relevant to one or more of the assignments of its Mission Statement.

(1) The Chairman and Ranking Minority Member of the House Committee on Education and Labor and the Chairman and Ranking Minority Member of the Subcommittee on Labor-Management Relations together on August 4, 1993 requested the Comptroller General of the United States to make a study of the complex web of workplace regulations including those administered by the Labor Department. The study was to seek the variability in definitions in terms common to such regulations and the

perceptions as to these regulations held by employers, and unions in workplaces governed by collective bargaining agreements, in a diverse group of workplaces. The study was also to seek views as to the regulatory and administrative processes respecting these regulations. The Commission had released on July 28, 1993 a listing of the major statutes and regulations affecting the workplace administered by the Labor Department.

(2) A number of employer associations - Aerospace Industries Association, Electronic Industries Association, Labor Policy Association, National Association of Manufacturers, and Organization Resources Counselors - have undertaken a survey among a number of businesses of the extent and characteristics of employee involvement plans.

(3) With the aid of private foundation funding, Professors Richard Freeman and Joel Rogers secured the services of a professional survey firm to do a study of the attitudes of representative workers and supervisors toward worker representation and participation. The study was undertaken by Princeton Survey Research Associates, Princeton, New Jersey.

(4) With the aid of private foundation funding, Professor Ray Marshall organized a conference in Washington, D.C. under the auspices of the Work and Technology Institute on March 14-15, 1994 with labor, management, government and academic experts on labor-management and employment issues from Western European countries, Japan, Canada, and Australia. The Commission hearing on March 16, 1994 included a summary of the conference and heard testimony from a number of the overseas participants. A report of the March 14-15 conference has been prepared for publication.

This Report of the Commission contains no separate chapter on the experience of worker-management relations in other countries. But the separate chapters each incorporate references to this experience, by way of comparisons or contrasts. The use of international comparisons is based on the belief that while it is not possible to import any given practice or institution found in another country to the United States neither is it advisable to ignore practices that work well in other settings. Just as American business has recognized the need to benchmark practices on a global scale, the Commission believes it is both possible and essential to be open to learning from experiences abroad.

The Counsel to the Commission, Professor Paul Weiler, organized three groups - of about eight in each - of lawyers which have met separately on several occasions to discuss issues before the Commission - groups of business lawyers including those within companies and in outside law firms, labor lawyers including those within unions and in outside law firms, and law school professors. Lawyers drawn from each of these groups have testified before the Commission on legal issues affecting the Commission's assignments.

A working party of the Commission has met on several occasions with a designated committee of the Small Business Council of the U.S. Chamber of Commerce to receive views and perspectives. A working party of the Commission heard reports from various local chapters of the Industrial Relations Research Association at its national meeting on January 4, 1994.

The Commission has encouraged a number of studies which are still in process, and when they have been completed they will be made available for comments.

The Commission gratefully acknowledges statistical data and information prepared for its use by the Bureau of Labor Statistics, the Office of the Solicitor, the Women's Bureau, the Department of Commerce, the General Counsel of the National Labor Relations Board, the Federal Mediation and Conciliation Service, and the Small Business Administration.

Mr. Roland Droitsch, Office of the Assistant Secretary for Policy, coordinated this work in the Department of Labor and Mr. Everett Ehrlich, Office of the Secretary, provided assistance in the Department of Commerce. Staff of the Department of Labor's Office of Small Business and Minority Affairs greatly assisted the Commission in its hearings and related activities. The work of Ms. Artrella Mack and Ms. Betty Cooper were invaluable in the technical preparation of this Report. Ms. Joy Reynolds, Office of the American Workplace, prepared summary of minutes for the Department. Secretaries to members of the Commission, beyond their regular duties, greatly facilitated the work of the Commission. The Commission is most grateful.

The Commission has received some testimony, and many letters regarding specific regulations, interpretations, rulings and decisions issued under employment statutes and labor-management relations laws. These cases have been helpful in understanding wider issues and regulatory processes, and this Report does mention some of these questions in the course of the discussion. But the Commission was not designed to respond to or to resolve such specific cases.

This Report raises a number of questions at various points in the discussion for the purpose of eliciting more data and information and more reflection on difficult issues. It should not be inferred, however, that the Commission intends to provide responses to all these questions in a final report.

A Historical Perspective on the work of the Commission is provided in Appendix A.

The Commission welcomes from all parties comments and suggestions regarding this Fact Finding Report. Please address comments to: The Commission on the Future of Worker-Management Relations, c/o Mrs. June M. Robinson, Designated Federal Official, U.S. Department of Labor, Room C2318, 200 Constitution Avenue, NW, Washington, DC 20210.

Chapter I

The Changing Environment for Worker-Management Relations

1. Introduction

The American economy, the work force and jobs, the technology at workplaces, the competitive context of enterprises, and the regulations of employment have changed greatly in recent decades. The environment for firms and workers differs markedly from what it was when the basic structure of legislation governing labor-management relations in the United States was established.[1] The changing economic and social environment poses challenges to some aspects of established worker-management relations and has created problems in employment, earnings, and other job market outcomes for many Americans. This chapter identifies those facts about the changing economic and social environment that bear directly on the Mission Statement of the Commission and highlight the challenges these facts pose for existing workplace practices, worker-management relations, and labor regulations.

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[1] The principal laws governing workplace organization are the Railway Labor Act (1926), the Wagner Act (1935) and the Taft-Hartley Act (1947), and their subsequent amendments. Other key laws dating from this period include the Social Security Act (1935) and the federal-state system of unemployment insurance, and the Fair Labor Standards Act (1938). The wartime labor relations policies of World War II and the Korean War left their imprint for many years.

2. The Changing Economy

Among the myriad of economic developments that have affected the United States in the past several decades, the following have been significant for many American workers and enterprises:

1. A long-term decline in the rate of growth of productivity, measured in Gross Domestic Product (GDP) per employee or per employee-hour.

- From 1950 to 1973 GDP per employee in the U.S. grew by 2.6 percent per year. From 1973 (roughly following the first oil shock) to 1992 GDP per employee grew by 0.5 percent per year. Non-farm business output per hour increased at the annual rate of 2.5 percent per year in the period 1948 to 1973, but only at the rate of 0.6 percent per year from 1973 to 1979 and at the rate of 1.0 percent per year in the years 1979 to 1992.

- Manufacturing has had a different productivity experience. The rate of growth of productivity fell in the 1970s but recovered in the late 1980s and 1990s to its historic level of approximately 2.5 percent per year. While there are problems in measuring productivity in the service sector, which raise some doubts about the magnitude of the economy-wide productivity slowdown, no analyst has seriously questioned that GDP per employee is growing at a pace below its historic rate.

- Productivity growth in most other advanced economies and in several developing countries exceeded that in the U.S. in the last several decades. All advanced countries experienced a reduction in the rate of productivity growth starting with the first oil shock of 1973. Although the decline in the rate of productivity growth was greater in many countries than in the U.S., these countries still enjoyed higher productivity growth than the U.S.

- Low productivity growth does not, however, mean low productivity. The U.S. has on average the highest productivity per worker and per hour among major economies, although Western Europe and Japan are not far behind. In some sectors, their productivity exceeds ours.

- The slowdown in productivity growth occurred despite sizeable American research and development expenditures. Total R&D in the U.S. exceeds those of our four closest industrial competitors - Japan, West Germany, the United Kingdom and France. But Japan and Germany outpace the U.S. in R&D as a percentage of gross national product; this is especially the case for non-defense research and development. In 1990 the U.S. spent 1.9 percent of GDP on non-defense R&D compared to 3.0 percent in Japan and 2.7 percent in West Germany.

Slow productivity growth makes it difficult for Americans to enjoy rising standards of living and bounds the feasible increases in wages and benefits that firms can pay and their international competitiveness at any given exchange rate of the dollar.

2. An increased globalization of economic life, reflected in trade and capital flows, and immigration.

- In 1960 the most commonly used measure of the magnitude of trade on the economy, the ratio of exports and imports to GDP, was 0.094. In 1991, it was over twice as large, 0.214.[2] The ratio of exports and imports to GDP in other countries also rose over this period, as world trade expanded greatly.

- A growing proportion of manufacturing imports comes from relatively low wage developing countries, such as China.[3] Reductions in trade barriers, the success of export-oriented developing countries on world markets, the huge trade surpluses run by Japan, and reduction in America's productivity edge over Europe create a more competitive market for American firms subject to international competition.

- Throughout the 1980s and into the early 1990s, the U.S. ran a substantial trade deficit in its national accounts. This deficit was financed by foreign purchases of U.S. financial assets, such as bonds and stocks, of real assets, such as property and businesses, and by direct foreign investments in the U.S. The U.S. moved during the 1980s from being the world's greatest creditor nation to the world's greatest debtor nation.

- Trade balances in high technology goods between 1980 and 1988 showed that the Japanese tripled their trade surplus, while the U.S. and the major European countries reduced their positive balances. At the same time, the proportion of patents issued by the U.S. Patent and Trademark Office of foreign origin have increased over the past decade or so.[4] In 1978 out of 66,097 patents, 24,847 or 37.6 percent, were of foreign origin. In 1991 out of 96,047 patents, 45,152 or 47.0 percent, were of foreign origin.

- As a result of the flow of capital to the U.S, an increasing proportion of Americans have been employed by foreign-owned firms. In 1989 4.4 million Americans worked for U.S. affiliates of foreign companies -- 3.8 percent of all workers compared to 1.2 percent of all workers in 1974. At the same time, U.S. owned companies employ many foreigners in their overseas operation. Major multinational companies, regardless of national origin, consider locating facilities throughout the world.

In a global economy, firms face competitors whose workforces receive different levels of pay and work under different rules than those in the U.S., requiring the nation to consider its labor relations from a broader perspective than in a closed economy.

3. The declining value of the dollar and greater reductions in unit labor costs in the U.S. than overseas increased the competitiveness of U.S. firms in the international marketplace in the late 1980s, in contrast to the difficulties created by the high value of the dollar in the earlier part of the decade.

- Global integration has heightened interest in the ability of U.S. firms to compete with foreign firms. One determinant of competitiveness is the exchange rate of the dollar. Using

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[2] Economic Report of the President, February 1994, Table B1.

[3] In 1992 mainland China was the fifth largest importer to the U.S. (Japan, Canada, Mexico, and Germany were the top four). China and Taiwan together are the third largest importer. The U.S. trade deficit with China is second to that with Japan.

[4] The U.S. Patent Office determines the nationality of a patent on the basis of the residency of the applicant. Patents given to subsidiaries of American firms overseas for inventions there are counted as foreign patents. while patent given to U.S.-based subsidiaries of foreign firms are counted as U.S. patents.

1979 as an index of 100, the real (inflation adjusted) value of the dollar compared to foreign currency of our trading partners rose to 159 in 1985, then fell back to 100 in 1992. The result was that U.S. firms faced a major cost disadvantage in the mid-1980s, but have recovered since. Our share of world manufacturing exports dropped in the mid-1980s, but has returned to its earlier level.[5]

- The decline in the exchange rate of the dollar and slow growth of wages in the U.S. made the country a lower-wage competitor relative to several other advanced countries, as the tabulation of hourly compensation in dollars in manufacturing in Exhibit I-1 shows.

- The growth of productivity relative to the growth of wages determines unit labor costs, which also greatly affects competitiveness. In the U.S. output per hour increased 2.4 percent a year in manufacturing from 1979 to 1992, while nominal wages increased modestly more rapidly. In most of our trading partners, nominal wages increased considerably more rapidly than productivity. The result was a reduction in the relative unit labor cost of U.S. products compared to products in other countries.

- Exhibit I-2 shows movements in three measures of international competitiveness. The real effective exchange rate; relative unit labor costs; and the relative unit value or price of manufactured exports. All three show the same trend, but the greatest increase in competitiveness is in unit labor costs.

EXHIBIT I-1

Hourly Compensation Costs in Some Major Trading Partners Relative to the United States: 1975 and 1992 (U.S. labor costs are scaled at 100)

	1975	1992
United States	100	100
Belgium	101	136
Denmark	99	124
France	71	104
Germany	100	160
Italy	73	120
Sweden	113	150
United Kingdom	53	91
Canada	94	106
Japan	47	100
Korea	5	31
Taiwan	6	32

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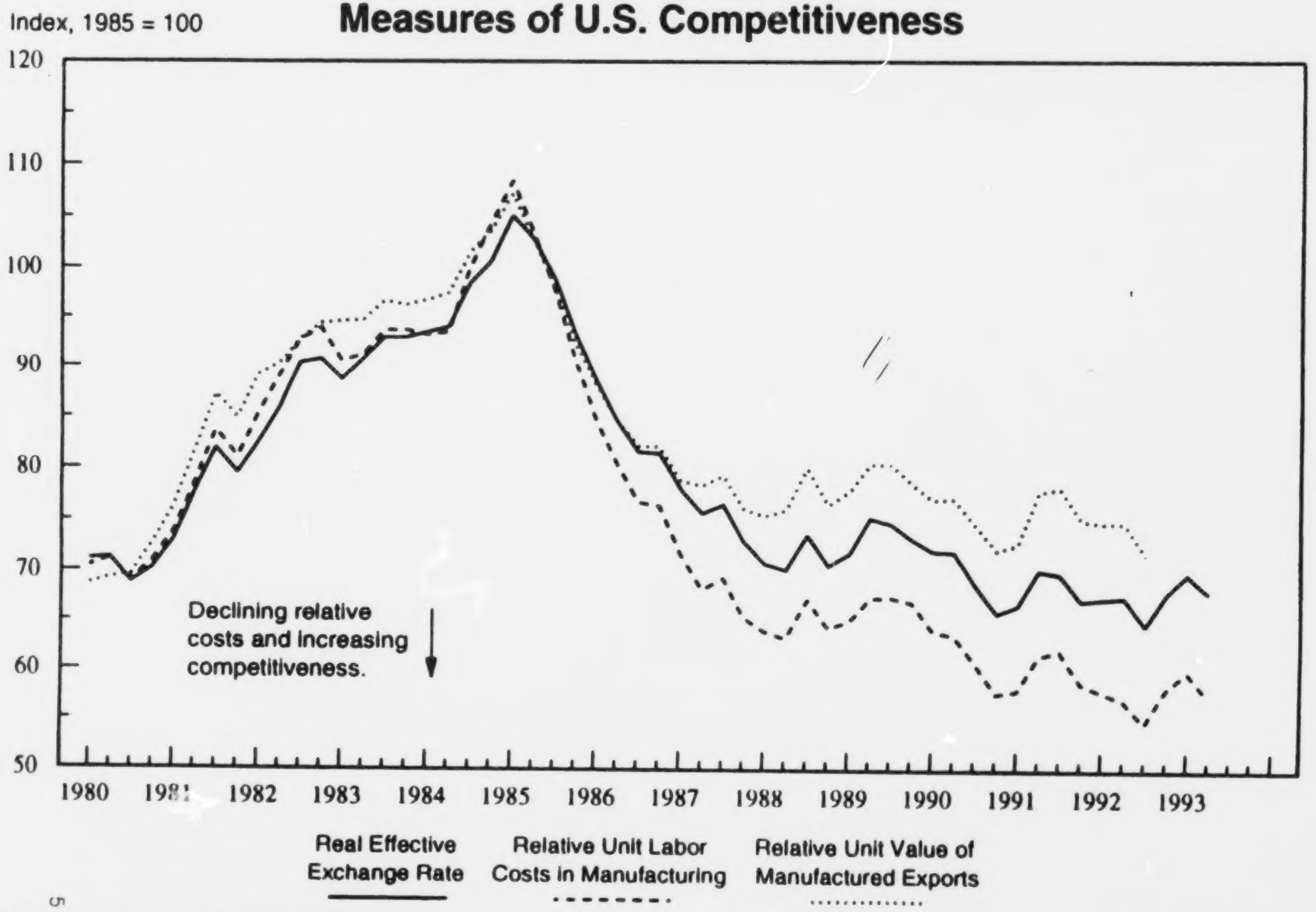
[5] In 1991 the U.S. share of world exports of manufactures was 17.2 percent, which exceeded the level of 16.8 percent in 1980. U.S. Bureau of Census, Statistical Abstract, 1993, Table 1264.

EXHIBIT I-2

Measures of U.S. Competitiveness



Declining relative costs and increasing competitiveness.

Source: International Monetary Fund.

4. Technology has changed the work performed at many workplaces and will continue to do so into the future.

- The most visible symbol of the new world of work is the computer, which is virtually ubiquitous in offices, factories, and stores. In 1989 38 percent of workers used a computer on the job. Sixty percent of college graduates used a computer compared to just over eight percent of persons who were not high school graduates.[6]

- Some technological changes require more skilled workers. Others downgrade existing skills. The current consensus is that the former predominates, so that technology has raised the demand for skills, responsibility, and knowledge. In manufacturing there has been a marked increase in the proportion of employees in more skilled white collar jobs. Between 1978 and 1993, for instance, the number of professionals and managers in durable manufacturing increased by 9.6 percent while the number of production workers fell by 33 percent.

- Some technological changes have blurred the line between employees and supervisors and in the arrangement of work responsibilities. The new information technology has made time-based competition a new mode of business and in some cases flattened management pyramids.

In an economic world where knowledge is critical, firms that effectively develop and use the brainpower of employees have an advantage over competitors; workers who lack the requisite skills and knowledge are disadvantaged in the job market.

5. The structure of employment by industry has shifted to service-producing sectors from goods-producing sectors, such as from manufacturing and agriculture.

- In 1990 77 percent of non-agricultural employees worked in service producing activities. This compares to 59 percent in 1950.[7] Indicative of the change in structure, the number of Americans working for colleges and universities in 1993 was virtually the same as the number working in the motor vehicle and equipment, blast furnace, and basic steel product industries combined.

- Manufacturing constituted 17 percent of all non-agricultural employment in 1993 compared to 34 percent in 1950. Durable goods manufacturing employment has grown relative to non-durable goods manufacturing employment.

- In agriculture, employment declined from 7.2 million in 1950 to 3.2 million in 1990, due in large part to a fall in self-employed workers and unpaid family workers.

- The government share of non-agricultural employment has risen modestly since 1960. In 1960 15.4 percent of employees on non-agricultural payrolls were employed by state, local, and the federal governments. In 1993 17.1 percent of employees on non-agricultural payrolls were government employees.[8] The federal share of employment has fallen while the state and local government share of employment has risen.

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[6] Statistical Abstract of the United States, 1992, Table 648.

[7] These are from the household data reported in Employment and Earnings, January 1994, Tables 23 and 24, and include self-employed unpaid family workers. Establishment data that are limited to wage and salary workers give slightly different figures.

EXHIBIT I-3
Percent Change in Employment, Level of Employment and Projected Change in Employment, by Occupation
1979 to 2005

	Percent Change, Actual 1979-1992	Number in Millions in 1992	Percent Change, Projected 1992-2005
All Occupations	19.0	121.1	21.8
Executive, Administrative & Managerial	50.4	12.1	25.9
Professional Specialty	43.0	16.6	37.4
Technicians and Related Support	57.6	4.3	32.2
Marketing and Sales	30.7	13.0	20.6
Service Occupations	24.6	19.4	33.4
Administrative Support, Clerical	15.0	22.3	13.7
Precision Production, Craft, Repair	4.3	13.6	13.3
Operators, Fabricators, Laborers	10.3	16.3	9.5
Agriculture, Forestry, Fishing	-5.2	3.5	3.4

- Non-agricultural employment grew especially rapidly in industries with low productivity growth and in those with low wages. The big gainers in employment were wholesale trade; retail trade; finance, insurance and real estate; and service industries, including health care. Industries with rapid growth of labor productivity experienced falls in relative employment in the economy as a whole and within manufacturing. Still, there are exceptions to this pattern: employment in some industries with high pay, such as computer and data processing and doctors' offices, grew over the period.

The new industrial composition of employment demands workers with different skills and with different responsibilities at the job than in the past and has contributed to the relative decline in the number of high paying jobs for manual workers.

6. The occupational structure of the workplace has shifted toward white collar jobs that require considerable education.[9]

- The tabulation in Exhibit I-3 shows the percentage change in employment by occupation in the period 1979 to 1992 and that projected by the BLS

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[8] These figures are from establishment data which provide a longer and arguably more accurate measure of government employment than household survey data.

[9] The U.S. government changed its occupational classification in 1983 so that the figures are not strictly comparable for the period 1979-92.

for the period 1992 to 2005. The rapidly growing managerial and administrative, professional, technician and related service jobs are largely exempt positions under the wage and hour law and most are outside the definition of employees under the National Labor Relations Act. Compensation for these employees is relatively high and increased over the past 10 to 15 years more rapidly than for other employees. These occupations also typically require higher education.

EXHIBIT I-4

Number of Establishments and Firms and Number of Employees
in Establishments and Firms, by Size Class 1992

Size Class	Establishments (in 000s) # Establishments	 # Employees	Firms (in 000s) # Firms	 # Employees
0 to 4	3,245	5,675	2,764	4,859
5 to 9	1,164	7,682	924	6,071
10 to 19	727	9,786	550	7,387
20 to 49	486	14,722	345	10,394
50 to 99	167	11,477	113	7,749
100 to 249	95	14,182	63	9,429
250 to 499	24	8,133	18	6,259
500 to 999	9	6,260	8	5,656
1,000+	5	11,353	8	31,465
TOTAL	5,923	89,269	4,794	89,269

- The science and engineering workforce in private industry continued a long growth trend at an annual rate of almost four percent. The proportion of science and engineering jobs in manufacturing increased from 5.0 percent in 1983 to 5.5 percent in 1989.

- Employment of administrative support and clerical positions, precision production and craft employees as well as operators and laborers increased in the past 13 years less rapidly than the average of all employment, and is projected to increase less rapidly than the average in the period 1992 to 2005. Americans with high school degrees or less education have historically filled these jobs.

The growing high skill work force has workplace needs that arguably differ in some important ways from those of the workers who were envisaged in traditional labor laws.

7. The American workplace includes millions of establishments and firms of different sizes, whose workplace practices and outcomes differ depending in part on the number of employees.

- Exhibit I-4 shows the number of establishments and employees in thousands by the size class of the establishment or "legal entity" (firm) in the private sector in 1992.[10]

- At the extremes 5.7 million workers are employed in establishments with fewer than five employees and 13.4 million in establishments with less than ten employees; whereas over 11.3 million are employed in establishments with over 1,000 employees. Thus 15 percent of American workers are in quite small establishments (less than ten employees) and nearly 13 percent in the largest establishments.

- Since large firms often have many establishments, the distribution by firm size shows a greater concentration among firms with over 1000 employees than among establishments in that size class. Firms with more than 1000 employees employ 35.2 percent of the work force whereas firms with less than ten employees employ 12.2 percent of the work force.

- In manufacturing, there is little support for the claim that most employment growth is generated by small firms. While small plants and firms do account for most newly-created jobs, they also contribute disproportionately to the number of jobs that disappear. Survival rates for new and existing manufacturing jobs increase sharply with employer size. Smaller manufacturing firms and plants exhibit sharply higher gross rates of job creation but not higher net rates because of their higher gross job destruction rates.[11]

- Smaller enterprises pay lower wages than larger enterprises in the same industry, and are less likely to offer health and retirement benefits. Spending on insurance and retirement benefits per worker increases with the size of enterprise. In the size categories 1-99, 100-499 and 500 or more, health insurance and pensions costs per hour in March 1993 were respectively \$1.09, \$1.31 and \$2.32.[12] Most firms in the 1-24 size category do not provide such benefits.

- While smaller firms and establishments do not offer the same wages and benefits as larger firms, many workers have traditionally used them as first jobs that lead to better employment outcomes. The lack of formal structure also makes many small workplaces attractive to employees.

- Health benefits for retirees, financed in part by former employers apart from Medicare were provided in 1990 by 15 percent of establishments with fewer than 100 workers and by 45 percent of establishments with 100 or more workers.[13]

- Most enterprises in the United States determine compensation and working conditions on their own, without the coordination of employer associations. This contrasts with the situation in Western Europe or Japan, where employer associations are a decisive factor in determining wages and hours. In Europe agreements between associations and unions usually extend to establishments of all sizes.

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[10] These data are for workplaces covered by state unemployment insurance laws and thus exclude some firms, self-employed workers, railroad employees, agricultural workers, and some others.

[11] Steven J. Davis, John Haltiwanger, Scott Schuh, Small Business and Job Creation: Dissecting the Myth and Reassessing the Facts, October 1993.

[12] (USDL: 93-220)

[13] CWC, August 1993, p.1.

The disparity between smaller and larger firms creates different environments for worker-management relations in the United States, with firms and workers having different options and needs depending on firm size.

8. During the past 10 to 20 years many product and financial markets in the U.S. have faced turbulent conditions through deregulation of rates and prices and the removal of barriers of entry; or through government cutbacks in defense or other programs.

- The product markets for railroads, airlines, trucking, natural gas, telephone and cable television are the major fields of de-regulation, although some public services have also been privatized. De-regulation has affected employment and wages and labor-management relations in these sectors.

- Changes in financial markets have led to considerable mergers and restructuring of firms and battles for control of corporations that can affect the employment and well-being of employees. In some cases employees benefit in the long run from changes in ownership, as new managers lead the firm in more productive directions. In other cases, the consequences are adverse for employees, with new owners downsizing the firm and demanding wage and benefit concessions from workers.

- Defense-industry cutbacks have created major economic problems for many enterprises, communities and for selected occupations. Occupations with a significant reliance on military programs include engineers, particularly aeronautical and astronautical engineers, and aircraft assemblers, and numerical tool controllers.

Turbulence in product and financial markets tends to create insecurity at workplaces and can upset labor-management relations in ways that raise the costs of structural change.

3. The Changing Workforce

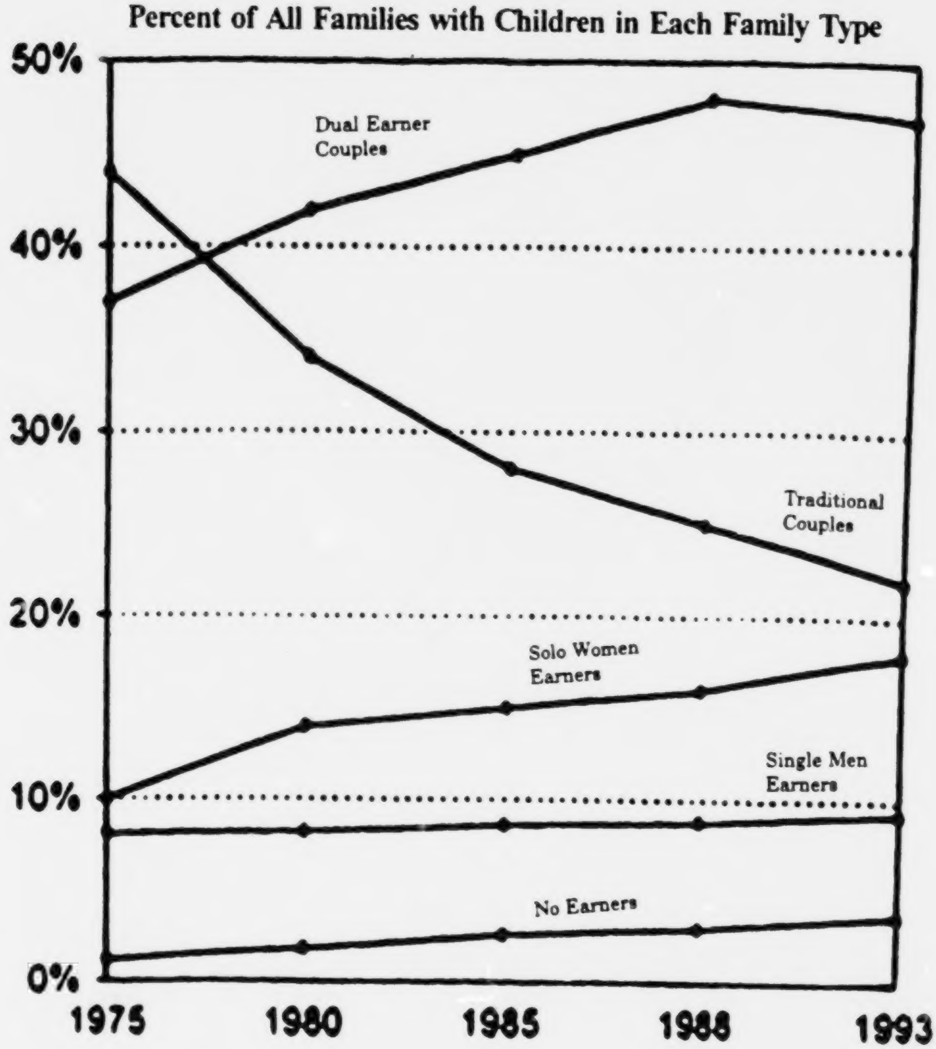
The number of workers, the demographic and ethnic composition of the American workforce and their educational levels have changed over the past several decades. In 1950 firms hired workers from a civilian labor force of 62.2 million persons. In 1993 the American workforce of 129.5 million persons was more diverse and better educated.

9. A higher proportion of Americans work or seek work than ever before, due in large part to the movement of women into the workforce.

- In 1950 59.2 percent of the population was in the civilian labor force; in 1993 the percentage had risen to 66.2. The principal reason is the movement of women into the workforce. In 1950 33.9 percent of females of working age were in the labor force; in 1993, 57.9 percent were in the labor force. The percentage is projected to increase further to 63.0 percent in 2005. In 1993 58 percent of married women with children under six years of age worked.

- By contrast, in the same period the proportion of males in the civilian work force dropped from 86.4 percent to 75.4 percent, due in large part to declines in the age of retirement. The labor participation rate for men is projected to continue to decline.

The Increasing Responsibility of Women Workers for Family Financial Needs



SOURCE: Institute for Women's Policy Research calculations based on Hayghe, 1990; U.S. Bureau of Labor Statistics, 1993.

- Exhibit I-5 shows that the composition of families by earnings has been greatly altered. Many more families have two earners than in the past. Many more families have single female earners than in the past. The proportion of families fitting the traditional "Ozzie and Harriet" pattern of the male working in the labor market and the female working exclusively in household activities fell from a majority to a minority of families.

- The Bureau of Labor Statistics projects, in its moderate scenario, a lower rate of growth in the civilian workforce in the period 1992 to 2005 compared to 1979 to 1992. Annual growth rates are projected to be 1.3 percent a year for the period 1992 to 2005 instead of 1.5 percent a year in the years 1979 to 1992, or a net increase in the civilian labor force of 23.5 million in the 1992 to 2005 period compared to 22.0 million in the 1979 to 1992 period.

The increased role of women as both breadwinners and homemakers challenges traditional work arrangements and raises demands for flexible working hours, job-sharing arrangements, child care benefits, and parental leave.

10. The ethnic composition of the work force has changed.

- In 1954 approximately 10 percent of the workforce was non-White; in early 1994, 15.2 percent of the workforce was non-White. The Hispanic share of the work-force reached 9.0 percent in early 1994, in part because of sizeable immigration from Mexico and Latin America. The proportion of the population who were Asian or Pacific Islanders nearly doubled from 1980 to 1994, though from a small base.[14]

- In the 1992 to 2005 period the racial composition of the labor force is expected to continue to change, as the following annual growth rates for the labor force show:

	1979-1992[15]	1992-2005
White	1.3	1.1
Black	2.0	1.7
Asian	5.2	4.7
Hispanic	4.3	3.9

- Almost two-thirds of entrants to the civilian labor force in 1992 to 2005 are projected to be women and racial minorities and only one-third are projected to be White males.

The changing composition of the workforce challenges employers and labor organizations to develop training and employment practices that take account of the diverse backgrounds of employees and that guarantee equal employment opportunity for all.

11. The years of schooling attained by the workforce have increased greatly.

- In 1970 25.9 percent of the labor force aged 25-64 years had more than 12 years of schooling; 38 percent had a high school degree; and 36 percent had less than high school education. In 1992 52 percent of those aged 25-64 had more than 12 years of schooling: 25.7 percent had some college work; 26.7 percent were college graduates.

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[14] See Employment and Earnings, February 1994.

[15] The figures for Hispanics are from 1980 to 1992. They are for any race.

- Despite the huge increase in educational attainment more than 20 percent of students drop out of high school -- 50 percent in many inner city schools. In October 1991 in the age group 16-24, only 64.3 percent of men with less than a high school diploma were employed compared to 80.7 percent of men who had completed high school.

- Many high school dropouts go on to get a general education development certificate (GED), but GEDs are an imperfect substitute for a high school diploma in the job market. In addition, much training in workplaces goes to white collar and more educated workers, so that the less educated do not easily make up for their skill deficiencies through employer-based training, although some employers have exemplary programs.

- The military has historically trained many male high school graduates and until recently, many high school dropout men as well. The decline in the size of the military has made this form of education and route into the job market less common among the young.

- In 1989 about one-quarter of all students enrolled in U.S. graduate science and engineering departments were non-U.S. citizens. In engineering, mathematics and the computer sciences, the majority of Ph.D. recipients (over 55 percent) were non-United States citizens.

Traditional employee-management relations and regulations may not fit well the new highly educated workforce. The current training system does not meet the needs of less educated workers.

12. The age structure of the workforce has changed and will change greatly in the next decade as the "baby boom" generation ages.

- The median age of the labor force was 40.5 in 1962. With the post-World War II baby boom, the median age declined to 34.6 in 1980. It increased to 36.6 in 1990 and is projected to rise to 40.5 in 2005.

- The annual actual and projected growth rates for 16-24, 25-54, and 55 and over persons in the labor force from 1979 to 1992 and from 1992 to 2005 are shown below:

Age	**1970-1992**	**1992-2005**
16-24	-1.7	1.3
25-54	2.7	1.1
55 and over	0.2	2.5

- The most striking change is the acceleration in the growth rate of older workers compared to the deceleration in the growth of "prime age" workers.

- In the period 1992 to 2005 the Bureau of Labor Statistics projects that 51.2 million persons will enter the civilian labor force and 27.7 million persons will leave due to retirements, deaths and withdrawals. Almost twice as many people will enter the labor force as leave in this period for a net growth of 23.5 million.

The increase in the workforce aged 55 and older (combined with enhanced longevity) raises questions about the adequacy of pensions and health benefits, particularly in small enterprises, and the feasibility of financing the trend toward early retirement.

13. There has been an increased flow of immigrants, many from developing countries, into the United States.

- Large numbers have come legally, but many also have come illegally. As a result, the proportion of the population who are foreign born has risen from 4.7 percent in 1960 to 8.4 percent in 1990 according to Census of Population data. Since the Census fails to count perhaps a third of illegal immigrants,[16] and since immigrants have higher labor participation rates than the native-born, the actual proportion of workers who are foreign born may be as high as nine percent.

- Following the Immigration Act of 1964, immigrants from developing countries have made up the bulk of American immigrants. In the 1950s, only a third of immigrants came from developing countries; the largest countries for legal immigration were Germany, Canada, Mexico, the United Kingdom and Italy. In the 1980s, 84 percent of immigrants were from developing countries; the largest source countries were Mexico, the Philippines, China, Korea, and Vietnam. The increased proportion of immigrants from poorer countries has reduced the education and skill distribution of immigrants compared to native-born Americans. Many immigrants come with advanced training and degrees (such as Indian doctors, Filipino nurses et al) but many come with little schooling, largely from Mexico and other Latin American and Caribbean countries.

- The influx of less skilled immigrants was such that about one in five American workers with less than high school education were foreign born in the 1980s. The geographic concentration of immigrants in gateway cities and states places substantial burdens on those areas in providing social services to a growing low-income population.

- Immigrants are disproportionately employed in low wage import-competing industries. Illegal immigrants make up a significant share of employment in several sectors: apparel manufacturing; leather and footwear; private household jobs. In addition, many immigrants, particularly those who enter the country illegally, work in poor conditions outside the normal rules of the labor market.

Immigration links American wages and working conditions to those in source countries. Immigrants often take difficult and low-paying jobs, which increases the output of the country. But by competing with less skilled native-born Americans, they also contribute to the falling real earnings and weak job opportunities for some native-born workers.

4. Changing Labor Market Outcomes

The changes in the economy, technology, workforce, and competitive conditions summarized above have interacted within the U.S. labor relations system to produce employment and wage outcomes that differ greatly from those in the past and fall short of meeting the needs of many Americans.

14. The United States has been more successful in creating jobs for those who seek work than most other developed countries, but unemployment remains high for

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[16] While our statistical data undercount "undocumented aliens", both the Census of Population and Current Population Survey find sizeable numbers. The current Immigration and Naturalization Service estimate is that in 1992 there were 3.2 million undocumented workers.

the less skilled; many American workers are insecure about their jobs.

- The unemployment rate of the civilian labor force was 5.3 percent in 1950 and 5.5 percent in 1990. The figure for 1993 was 6.7 percent of the entire labor force (6.8 percent of the civilian labor force). The averages of unemployment rates for the decades are as follows: 1950s - 4.5; 1960s - 4.8; 1970s - 6.2; 1980s - 7.3. By contrast, average unemployment in Western Europe in the 1980s was 9.1 percent.

- Unemployment in the U.S. affects many workers. In 1990, 14.7 percent of the workforce experienced some joblessness. Spells of unemployment were shorter than in other advanced countries -- American workers unemployed in 1990 had a median spell of 12.0 weeks. But since statistics on length of unemployment relate solely to those currently unemployed, by the time these workers find a job, they will have been jobless longer than 12 weeks. The amount of time they are likely to be jobless when they conclude their spell of unemployment will be roughly double the reported 12 weeks -- or nearly half a year.

- A 1991 Family and Workplace Institute survey found that 42 percent of workers reported that during the past year their places of employment experienced downsizing or permanent cutbacks of the workforce; 28 percent reported cutbacks in the number of managers. Many workers feared for their job security; 18 percent felt it very likely or likely they would be laid off temporarily next year and 17 percent reported that likely or very likely they would lose their job permanently.[17]

- Unemployment rates vary inversely with years of schooling. In 1992, the unemployment rate for those with less than a high school education was 11.4 percent; for those with only a high school education, 6.8 percent; for those with a bachelor degree, 3.5 percent; while for those with a professional degree, 1.4 percent. Unemployment rates have also been lower for white collar workers than for blue collar workers, but in recent years the gap in rates between these two groups has diminished.

- Unemployment rates for minorities are considerably higher than for Whites.[18] In 1993 12.9 percent of Blacks were unemployed compared to 6.0 percent of Whites. For young Blacks, rates of unemployment are high, and many do not participate in the workforce at all. In 1993 just 50.8 percent of 16-24 year old Blacks not enrolled in school were employed compared to 72.8 percent of 16-24 year old Whites not enrolled in school. For those in the labor force, the rate of unemployment was 26.8 percent for 16-24 year old not enrolled Blacks compared to 11.0 percent for similarly aged not enrolled Whites, and 15.9 percent for Hispanics aged 16-24 not enrolled in school.

- In the four previous recessions prior to 1990 44 percent of the increase in job losers were on temporary layoff -- expecting recall to their previous employer. The remaining 56 percent of additional recession-induced job losers were permanent job losers, persons who did not expect recall. But from July 1990 to June 1992, when unemployment peaked, only 14 percent of the increase in job losers expected to be recalled, whereas 86 percent were permanent job losers.

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[17] Family and Workplace Institute, The Changing Workforce, Highlights of a National Study, 1993, Table 3.

[18] The data for unemployment in this section comes largely from Employment and Earnings, January 1994, household data annual averages, Tables 3 and 6.

EXHIBIT I-6
The Stagnation of Real Earnings Growth in Establishment and Household Surveys 1973-1993

	Compound Growth Rate Per Year
Establishment Survey Data	
Average hourly earnings, private nonagriculture, Production and Nonsupervisory Workers, 1973-1993	-0.7%
Hourly Compensation, Business Section, 1973-1992	0.4%
Total Compensation, Empoyment Cost Index, 1979-1993	0.1%
Compensation of Full-time Equivalent Workers, 1975-1991	0.2%
Household Survey Data	
Median Weekly Earnings of Full-time Workers, 1979-1993	-
All	-0.3
Male, 25 and over	-1.0
Female, 25 and over	-0.4
Median Annual Income, Full-time Workers, 1973-1992	
Male	-0.5
Female	0.7

The unemployment insurance system, which was intended for workers temporarily laid off, is not well-suited to help those suffering from structural unemployment problems due to permanent job loss or educational deficiencies.

15. The real hourly compensation of American workers stagnated in the past two decades and actually fell for male workers -- developments unprecedented in the past 75 years in this country.

- From 1929 to 1973 earnings of American workers increased in real terms by some two percent per year. For the period 1973 to 1992, estimates of compensation per year from establishment and household surveys deflated by the CPI show a very different pattern -- stagnation or decline in real earnings. The compound annual average changes in earnings from the different series are given in Exhibit I-6.

- Compensation series differ in various ways -- the sample covered; whether or not they include employee benefits or social insurance; time coverage (for some of the series we report figures going back to 1973, others begin in later years, in others we report figures from 1979) -- but they tell the same story: that real hourly pay did not increase in the 1980s to early 1990s at anything like the historic pattern of two percent a year.[19] The figures that relate to wages and salaries show smaller growth of real pay than those that include benefits; those for production workers and those for male workers show the biggest drops.

- The slow growth of U.S. wages has reduced the gap between the real pay of American workers and workers in other advanced countries. Deflating wages by OECD purchasing power parity price indices (which measure how much different currencies buy in the consumer market) shows that workers in several European countries such as Germany, Belgium and Norway have attained roughly comparable hourly real earnings to American workers.[20]

- For the non-farm business sector as a whole, output per hour increased a total of 13.8 percent from 1979 to 1992 while hourly compensation deflated by the consumer price index increased by just 3.6 percent. One reason for this is the greater increase in the consumer price index than in the deflator for output. This implies an increased gap between the cost of labor relative to the producer prices (which affects employment decisions by firms) and the purchasing power of wages relative to the consumer prices (which affects living standards).

16. The gap in earnings between higher paid and more educated or skilled workers and lower paid and less educated workers has increased greatly in the U.S.

- The median annual income, in 1991 dollars, of men and women according to educational attainment in 1972 and 1990 are reported in tabular form:[21]

	Men		Women	
	1972	1990	1972	1990
Less than High School	26,462	20,306	15,117	14,338
4 Years High School	33,961	27,629	18,911	19,093
1-3 Years of College	38,117	32,892	21,530	23,161
4 or More Years College	48,299	44,310	28,971	31,668
Ratio 4 or more College to 4 years of High School	1.42	1.53	1.60	1.66

These data show that real earnings fell more for male workers with less than 4 or more years of college than for college graduates and have fallen for women with less than high school education.

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19 We have used the CPI deflator in these calculations. Similar results are obtained if we use the consumption deflator from the national income accounts, or variant CPI series.

[20] Measured by exchange rates, workers in these countries are higher paid than Americans, but the exchange rates do not reflect the higher cost of living in other countries. All purchasing power parity measures show that prices in most other OECD countries are higher than in the U.S. at 1993 exchange reates.

[21] These data were presented to the Commission by the Bureau of Labor Statistics on May 24, 1993 as part of the BLS' presentation of facts.

- A group that has fared particularly poorly in terms of earnings growth has been younger men, particularly those with less than college education. In addition to facing falling real earnings, these men are less likely to have pensions than similarly aged men years ago.[22] Their ability to form families and buy homes has been compromised by their labor market plight.

- The usual weekly earnings, in 1991 dollars, of workers in managerial and professional occupations and in service occupations in 1983 and 1991 are reported above:

	Men		Women	
	1983	1991	1983	1991
Managerial and Professional	706	753	489	527
Service	349	330	237	244
Ratio	2.02	2.28	2.06	2.16

These data show a pattern much like that in education: falling real earnings for men, particularly those with low wages, and a rising ratio of earnings for the high paid relative to the low paid.

- Several factors have been proposed as contributing to the widening earnings inequality. Some analysts stress the importance of trade, particularly with less developed countries; others stress technological developments; others point out that the influx of less skilled immigrants added to the supply of less skilled workers in the job market; others have noted that the growth of the college workforce decelerated during the 1980s. In addition to these factors, the decline of unions, who historically reduce earnings differentials within establishments and bring the earnings of production workers closer to that of supervisory workers, has contributed to the rise in inequality. For workers with very low earnings, the fall in the value of the minimum wage relative to the price level has also played a role. Even after the 1990 and 1991 increases in the minimum, it was at an historically low level relative to average earnings.

17. The number of low wage fully employed workers in the U.S. has grown greatly, with the result that a sizeable proportion of U.S. workers are paid markedly less than comparable workers in other advanced countries; by contrast, high paid U.S. workers earn more than high paid workers in other advanced countries.

- About 18 percent of the nation's year-round full-time workers earned less than $13,091 in 1992 -- a 50 percent increase over the 12 percent who had low earnings in 1979. These workers consist disproportionately of women, young workers, Blacks, Hispanics, and the less educated.

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[22] Coverage of full-time male employeees in pension plans decreased from 54 percent in 1972 to 51 percent in 1988. Because many plans often require workers to make voluntary contributions, low wage younger workers have a lower tendency to join such plans when they are available, than other workers.

- Measures of the gap between the earnings of workers in the highest decile of earnings and those in the lowest decile show that the U.S. earnings distribution among workers has widened greatly and is the most unequal among developed countries. OECD data shows that male workers in the bottom decile earn 38 percent of median earnings in the United States whereas the bottom decile of workers earn 68 percent of the median earnings in Western Europe. In the upper rungs of the earnings distribution, male workers in the top decile in the U.S. earn 2.14 times median earnings whereas male workers in the top decile in most European countries earn 1.4 to 1.7 times the median.[23] The ratio of earnings in the top decile to the lowest decile in the U.S. is 5.63 -- by far the widest among OECD countries.

- As a result of stagnant or declining real earnings in the U.S. and a wide and increasingly unequal earnings distribution, lower paid workers in the U.S. earn markedly less than comparable workers in Western Europe. The bottom third of American workers earn less in terms of the purchasing power of their pay than the bottom third of workers in such European countries as Germany, France, Belgium. Tenth decile male workers in the U.S. are paid barely half what tenth decile male workers make in Europe. In addition, many low-paid U.S. workers lack health insurance and other fringe benefits that are provided for all workers in other countries.

The stagnation of real earnings and increased inequality of earnings is bifurcating the U.S. labor market, with an upper tier of high wage skilled workers and an increasing "underclass" of low paid labor.

18. Americans put in more hours of work than workers in other advanced countries except for Japan.

- After having led the world in reducing hours worked, U.S. workers work about 200 hours more during a year than workers in Europe. For instance, in 1991 the OECD reports that Americans worked 1,737 hours over the year compared to 1,557 hours for Germans, 1,540 hours for the French, and 1,423 hours by the Dutch.[24]

- A major reason for the difference in working time is the greater length of vacations in Europe. Americans with sufficient seniority typically get two weeks of vacation, though some get more and others less. By contrast, Europeans typically obtain 4-5 week vacations, often legally mandated, from the first year hired.

- The greater work time of Americans is a relatively new phenomenon. The length of vacation and holiday time in the U.S. for fully employed workers declined modestly in the past 20 years. Vacation and holiday time has increased in such European countries as Germany.

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[23] The United Kingdom and France are exceptions to the OECD pattern, with high decile earners earning about twice what median earners make.

[24] OECD Employment Outlook July 1993, Table B. Our figures are for dependent employment. The data shows that the Spanish work more hours than Americans, but Spain is a much lower income society.

- Many American workers work nonnormal hours in different locations. In 1991 6.2 percent of workers were multiple job-holders, reporting more than one job; 15.5 percent were on flexible schedules, compared to 12.3 percent in 1985; and 17.8 percent reported that they were on shift schedules. In addition, 18.3 percent of workers reported that they did job-related work at home. While many of these were self-employed, 15 million wage and salary workers also reported working at home.

- With a higher fraction of the working age population employed and those working averaging more hours than workers in Europe, Americans spend more time at work than people in other advanced countries. Surveys of preferences for work show that Americans also want to work more hours and report working harder than European workers.

The fact that Americans work so many hours makes conditions at work a major factor in the economic well-being of citizens.

19. The gap in earnings between men and women has declined in recent years, though women continue to earn less. The gap in earnings by race has fallen among women, but the earnings of black men were no better relative to that of Whites in 1993 than they were in 1970.

The following tabulations give median weekly earnings by race and gender for full time wage and salary workers (in 1993 dollars).

- The earnings of women, which have historically been lower paid than men, rose relative to those for men in the 1980s, but were still just 81 percent of male earnings for Whites in 1993. Some of the difference in pay by gender is attributable to differences in work experience or to differences in industry or occupation, but there still remains an unexplained residual gap in any given labor market category.

- The gap between the earnings of Black women and those of White women was relatively narrow. In 1970 Black women earned 85 percent of White women. In 1993 they earned 87 percent as much as White women. Within educational groups Black women earned approximately as much as White women, so that the remaining difference is attributable to differences in educational attainment.

- The earnings of Black men, which had risen rapidly relative to those of White men in the late 1960s to early 1970s following passage of the Civil Rights Act of 1964, stagnated relative to those of White men since 1970. In 1970 Black men earned 71 percent of what white men earned; in 1980 they earned 77 percent; in 1993, they earned 72 percent.

Year	White Men	White Women	Black Men	Black Women
1970*	584	353	417	302
1980	563	356	431	323
1993	531	403	392	349

*The 1970 Figures for Blacks refer to "Blacks and others."

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While the U.S. reduced earnings differentials based on gender and race, considerable differences remain.

20. The economy, the labor market and the legal system produce many jobs that diverge from full-time continuing positions with a single employer.

- There is no standard definition or data to encompass worker-management relations commonly grouped under the label "contingent workers." This term covers part-time workers, some of whom are voluntarily part-time, some of whom are multiple job holders. It also includes employees of temporary help agencies (who may be full-time workers), and some of the self-employed, including "owner-operators" or independent contractors with only a single contract or employer. Rather than grouping these disparate groups under one rubric, we consider each separately.

- Part-time workers have been a relatively constant share of the American workers at about 18 percent of the workforce in the 1980s to early 1990s. Many part-time workers choose part-time work voluntarily, but the proportion who would prefer full-time work has trended upward. In 1992 6.5 million workers were categorized as involuntary part-timers out of a total of 20.6 million part timers.

- Whether voluntary or involuntary, part-time workers are lower paid per hour than full-time workers; have higher turnover rates; are disproportionately young and female; and are more likely to work for employers who do not offer pensions or health insurance, Perhaps seven million part-timers work fewer than 1000 hours per year and are exempt from Employee Retirement Income Security Act and Family and Medical Leave Act (FMLA) benefits. Unemployment Insurance (UI) state earnings and requirements to be available for full-time work exclude most part-timers from UI benefits.

- The Department of Labor estimates that in 1992 there were 2.5 million temporary employees, approximately half hired through temporary agencies and half hired directly by employers. The number of workers in the temporary help services or help supply services industries more than tripled from 1979 to 1992. These workers are disproportionately young, female, and Black and tend to be in relatively low wage occupations.

- Self-employed workers differ greatly from part-time and temporary workers and include some of the nation's most highly educated and high paid workers. Independent contractors are included in the self-employed; some of them work for a single employer, possibly as a means for avoiding virtually all of the nation's labor laws.

- European countries and Japan draw somewhat different lines between contingent and other workers.[25] European countries distinguish between workers with permanent contracts, who are difficult to dismiss or lay off, and those with temporary employment contracts. The proportion of workers on temporary contracts ranges widely, from 5.3 percent in the United Kingdom to 32.2 percent in Spain. The proportion of the labor force that is involuntary part-time is higher in the

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[25] The data in this paragraph are largely from OECD Employment Outlook, July 1993.

United States than in other countries, but the proportion who are part-time is higher in many European countries than in the U.S., in part because of work-sharing or child-care arrangements.

- The increase in "contingent work" in the U.S. is largely the result of the way in which employers offer jobs to increase flexibility with uncertain product demand and to reduce labor costs by retaining a smaller core of year round full-time workers who receive full benefits which are not given to contingent workers; and of legal and tax arrangements that facilitate the formation of "owner-operator" arrangements rather than employer-employee arrangements.

The growing number of "contingent" and other non-standard workers poses the problem of how to balance employers' needs for flexibility with workers' needs for adequate income protections, job security and the application of public laws that these arrangements often preclude, including labor protection and labor-relations statutes.

21. A rising number of America's working-age population is involved in illegal activity, for which they have come under supervision of the criminal justice system, which has greatly expanded its employment.

- In 1991 789 thousand persons were federal and state prisoners and 426 thousand were in jails, for a total of over 1.2 million. Relative to the population the number of prisoners has more than tripled since 1970.
- Nearly 95 percent of state prisoners are men of working age and 91 percent of jail inmates are men. These figures imply that approximately 1.7 percent of the potential male work force in 1991 was incarcerated. Rates of recidivism are high, so that relatively few of these men are likely to be rehabiliated into productive members of the workforce. In 1990, an additional 3.2 million persons were on probation or paroled. The total number under supervision of the criminal justice system is thus equivalent to 6.4 percent of the 1991 male civilian workforce of 68.4 million persons.
- Of those in state prisons, in 1991 41.2 percent had less than 12 years of schooling;[26] 47.3 percent were Black; and 31 percent were not employed prior to their arrest. The rates of incarceration for young less educated men, particularly Blacks, are extraordinarily high. Many inner city youths report that they can earn more from crime than from legitimate employment and report substantial opportunities for illegal earnings.
- In 1990 1.7 million workers were employed in the criminal justice system providing police protection, legal services, correctional work, and the like. In the private sector guards and watchmen are one of the fastest growing occupations.

The large number of young American men involved in crime is a major drag on the economy, costing the U.S. considerable human and other resources far beyond those of any other advanced country.

22. The measured incidence rates of occupational injury and illness per full-time worker shows little improvement over the

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[26] The 1986 data show 61.6 percent with less than 12 years of schooling. A change in the survey question produced a sizeable reduction in the proportion in that group.

past decade. Fatal accidents declined but the number of workdays lost per full-time employee due to occupational injury and illness has risen; and workers' compensation costs have risen sharply.

- Occupational injury rates per 100 full-time workers were unchanged in the range of 7.6 to 8.7 in the 1980s.[27] Lost workday cases per 100 full-time workers were in the 3.4 to 4.0 range. But the number of lost workdays per 100 full-time workers rose from around 55 days in the 1970s to over 80 days in the early 1990s, implying that those who are sick or injured are out longer than in the past.

- Fatal accidents fell. Among the highest fatal accident workplaces are those in transportation, construction, services, agriculture and manufacturing in that order. About one-third of the 6,083 fatalities due to work injuries in 1992 resulted from highway accidents or homicides, each of which accounted for 1,000 deaths apiece.

- The number of workers covered by workers' compensation insurance grew from 36.9 million in 1950 to 95.1 million in 1990. Workers' compensation costs rose from 1.11 percent of payrolls in 1970 to 2.27 percent of payrolls in 1989. Medical and hospitalization benefits reached $16.8 billion in 1990. The rise in medical and hospitalization costs has been particularly sharp in the past decade.

- In the first half of 1993 17 state legislatures introduced initiatives to change workers' compensation. Ten states, by 1993, mandated joint labor-management health and safety committees in enterprises of a specified size (often 11 or more employees) or with above average health and safety problems as reflected in workers' compensation records.

- While comparisons of the level of U.S. and Canadian rates of workplace injury and sickness are subject to many problems, the trend rate in Canada is strikingly different from that in the U.S. Work-related accident rates declined in Canada from the early 1970's through 1992 and fell most rapidly in Ontario, which made a major effort to reduce accidents through joint health and safety committees and government-sponsored health and safety education.

America's occupational health and safety record has not improved to the extent that seems possible, with the result that work injuries are producing rising costs for firms, workers, and the economy.

5. Labor Relations Outcomes

Collective bargaining governs a declining fraction of workplaces and the workforce. Government regulations govern many more subjects and have become more pervasive, with increased reliance on administrative and court procedures to resolve issues of disagreement between employees and firms in the new economic environment.

23. The prevalence of collective bargaining has declined, as collective bargain-

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[27] Some of the lack of improvement in occupational health and safety injury rates may be due to changes in reporting, as the nation recognizes new forms of occupation-related health and safety problems.

ing agreements have not been negotiated for many new worksites and sectors.

- In 1993 the proportion of private sector nonagricultural workers who were union members was 11.2 percent, which is less than one-third the 35 percent or so covered in the 1950s. By contrast, over a third of public sector workers were union members in 1993, compared with 10 to 11 percent in the 1950s.

24. Overt conflict in the form of strikes or lockouts declined appreciably in the 1980s over levels of the earlier post-World War II years.

- The number of work stoppages involving 1,000 or more workers and the number of workers involved in these disputes per year has dropped sharply in the past two decades, as the following tabulation shows:

	Stoppages	Workers
1950s	**352**	**1,588,000**
1960s	**283**	**1,234,000**
1970s	**289**	**1,488,000**
1980s	**83**	**507,000**

In 1950 0.26 percent of working time was lost due to strikes. In 1990 the days idle constituted 0.02 percent of estimated working time.

- In 1990 to 1992 the number of stoppages involving 1,000 workers or more and the number of workers involved in these stoppages continued to decline. In 1992 there were 35 such stoppages involving 182 thousand workers.

The decline in collective bargaining in the private sector has created an arena for employee-management relations in which most employees have no independent organization to discuss issues with management.

25. Government regulations of the workplace have increased greatly.

- The number of statutes affecting the workplace, and the related regulations, have increased significantly over the past 25 years under the administrations of both political parties (see Chapter IV of this report). The enactment of ERISA, OSHA, the Immigration Reform and Control Act, Family and Medical Leave, and Americans with Disabilities Acts are illustrative of major regulatory developments.

- At the same time the appropriations for organization and staff to secure enforcement have not kept pace with the enlarged responsibilities of federal agencies. A significant development has been the enactment of the Administrative Procedures Act of 1990 which authorizes negotiated rule-making. But these procedures have been used infrequently.

- The administration of regulations has seldom resorted to alternative dispute resolution methods. An important development has been the experience in the Philadelphia area.[28]

- In contrast to the relatively centralized U.S. regulatory system, most European countries rely on elected groups of employees in "works councils" to meet with managers to determine workplace conditions and monitor compliance with national labor regulations.

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[28] See, A Cost Analysis of the Department of Labor's Philadelphia ADR Pilot Project, August 26, 1993.

The growth of federal regulations of the workplace leaves less room for local parties to determine the workplace rules that best meet the needs of their situations.

6. Summary

The Commission's findings with respect to the economy and labor market for American workers are set forth at the end of this Section. There is, of course, nothing sacrosanct about the 25 points around which we have organized our discussion. Some readers may prefer a more concise or a more elaborate listing of facts. Some may prefer greater emphasis on some facts rather than others. This said, the overall picture of the changing environment for worker-management relations given here is an arresting one.

The evidence shows that the economy and workforce have changed greatly in recent years. This is not the first period of massive change in the labor market: the movement of labor from agriculture to industry in the early part of the century, the growth of the mass production industries, the Great Depression, the boom of World War II. Whether the current restructuring is greater or smaller than earlier transformations need not be decided.[29] In terms of the Commission's charge, the key finding is that the changes affect the working lives of nearly all Americans and firms, and pose a major challenge to worker-management relations.

As noted, some of the changes described in this chapter pose major long term problems for our society. The low rate of growth of productivity makes it difficult for firms and workers to produce the continually rising living standards that have marked the economic history of our nation. The globalization of economic activity places firms and workers in greater competition with advanced countries that have evolved different rules of work and with less developed countries where pay is much lower than in the U.S. It makes competitiveness depend on fluctuations in exchange rates, almost regardless of what employers and workers do.

The increased demand for educated workers due to changes in the mix of industries and occupations and to technological changes and the growth of the educated workforce makes it critical that Americans obtain adequate schooling and job training. They also pose a problem for the country in finding ways to employ less educated workers at wages that enable them to support families at reasonable living standards.

The changing composition of the workforce -- more educated; more female, often part of a two-earner family; more likely to be members of a minority group; and getting older as the baby boomers age -- poses challenges to traditional modes of compensation and organization of work schedules and makes the provision of equal opportunity for all increasingly critical to our economic success.

The growth of contingent work and other forms of employment that break the mold of more permanent employment with a single employer raise questions about the ability of our traditional labor relations system to provide employee benefits, legal protection, and representation for those who want it.

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[29] The 1994 Economic Report of the President noted that changes in the structure of industry, measured by one-half the sum of the absolute value of shifts in the proportion of the work force in different industries, shows no trend since 1949. See Chart III-15.

While our labor market and employee-management system has done well in adjusting to these changes in some areas, notably job growth, it has done sufficiently poorly in others to raise serious concern about whether extant institutions and employee-management relations and regulations fit with the rapidly changing economic and social environment.

Among the signs of a failure to adjust to the changing environment in ways consistent with our past economic history of progress for virtually all our citizens are: falling real earnings for less educated and less skilled workers; stagnant growth of earnings for others; continued high levels of occupational injuries; lack of health insurance and other fringe benefits for many workers; an increased proportion of our young male workers incarcerated; high rates of joblessness for the less skilled. Our unemployment insurance system, which was intended for workers temporarily laid off, is not well-suited to help those suffering from structural unemployment problems due to permanent job loss or educational deficiencies.

A healthy society cannot long continue along the path the U.S. is moving, with rising bifurcation of the labor market.

The decline of collective bargaining in the private sector and increased reliance on governmental regulations and court suits to protect workers gives most employees no independent mechanism for dealing with their management as a group and moves employee-management policies from the local parties. The disparity between smaller and larger firms creates different environments for worker-management relations in the United States, with firms and workers having different options and needs depending on firm size. Diversity in size and in characteristics of workers argues for more, not for less, determination of working conditions and rules at worksites.

These are just some of the areas, to which others will be added in later chapters of this report, in which our factual review suggests that American labor and firms need a better future.

Twenty-Five Critical Factors in the American Labor Market

1. A long-term decline in the rate of growth of productivity.

2. An increased globalization of economic life, reflected in trade and capital flows, and immigration.

3. Increased competitiveness of U.S. firms in the international marketplace in the late 1980s and early 1990s, due to changes in unit labor costs and exchange rates.

4. Changes in the work performed due to changing technology.

5. A shift in employment to service-producing sectors from goods-producing sectors.

6. A shift in the occupational structure of the workplace toward white collar jobs that require considerable education.

7. Millions of establishments and firms of different sizes, whose workplace practices and outcomes differ depending in part on the number of employees.

8. Turbulence in many product and financial markets due to deregulation and

changes in government cutbacks in defense or other programs.

9. A higher proportion of Americans working than ever before, due in large part to the movement of women into the work force.

10. An increased minority share of the workforce.

11. Increased years of schooling by the workforce.

12. A changed aged structure of the work force as the "baby boom" generation ages.

13. An increased flow of immigrants from developing countries into the United States.

14. Substantial creation of jobs but high unemployment for the less skilled and considerable insecurity about jobs.

15. Stagnant real hourly compensation, with falling real compensation for male workers.

16. A rising gap in earnings between higher paid and more educated or skilled workers and lower paid and less educated workers.

17. A growing number of low wage fully employed workers whose living standards fall below those of low wage workers in other advanced countries.

18. Annual hours of work that exceed those in other advanced countries except for Japan.

19. A declining gap in the earnings of men and women, but stagnation in the gap between non-White and White workers.

20. A growing number of jobs that diverge from full-time continuing positions with a single employer.

21. A large growing population for whom illegal activity is more attractive than legitimate work.

22. Stagnant rates of occupational injury and illness and increased workdays lost per full-time worker, with increased workers' compensation costs.

23. A decline in the prevalence of collective bargaining.

24. Fewer strikes or lockouts.

25. Increased government regulations of the workplace.

CHAPTER II

Employee Participation and Labor Management Cooperation in American Workplaces

1. Introduction

Considerable change is underway in many of America's workplaces, driven in part by international and domestic competition, technology, and workforce developments described in Chapter I. These external forces are interacting with a growing recognition that achieving a high productivity/high wage economy requires changing traditional methods of labor-management relations and the organization of work in ways that more fully develop and utilize the skills, knowledge, and motivation of the workforce and that share the gains produced.

Changes are particularly visible in many large workplaces that have undertaken restructuring in response to economic pressures, in new worksites, industries, in organizations that have utilized these organizational principles from their start, and in work settings where managers, employees, and union representatives have adopted these ideas and built them into the overall fabric of their relationships.

Thus, since the 1980s, there has been a substantial expansion in the number and variety of employee participation efforts and workplace committees in both establishments governed by collective bargaining agreements and those without union representation. These arrangements take a wide variety of forms such as: quality circles, employee participation teams, total quality management teams, team-based work structures with a variety of responsibilities, safety and health committees, gain sharing plans, joint labor-management training programs, information sharing forums, joint task forces for a variety of problems, employee ownership programs, and worker representation on corporate boards of directors.

Employee involvement is also being practiced in many small workplaces where employees and managers work together and communicate on a more informal and personal basis.

Yet these workplace innovations are only partially diffused across the economy and many remain rather fragile. Some are of limited duration. Others are subject to a variety of risks and obstacles that may limit their sustainability and diffusion and the benefits they can potentially deliver to the nation's economic performance and standard of living.

The first item in the Commission's Mission Statement recognizes both the potential value and the partial diffusion of employee participation and labor-management cooperation. The Commission, therefore, is asked to assess:

> "What (if any) new methods or institutions should be encouraged, or required, to enhance workplace productivity through labor-management cooperation and employee participation?"

This chapter reviews the facts with respect to employee participation and labor-management cooperation. The sections that follow report on (1) the views of workers, managers and labor leaders, (2) the extent of employee involvement, (3) the issues addressed in these processes, (4) the evidence on their effects on economic outcomes, (5) their prospects for diffusion, and (6) the legal issues they raise.

2. Views Toward Workplace Participation and Cooperation

A variety of employees, managers, and local and national labor leaders testified and submitted statements in support of the goal of enhancing employee participation and worker-management cooperation.

Workers' Views and Expectations

Both survey data and direct testimony presented to the Commission documented that a majority of American workers want to have opportunities to participate in decisions affecting their job, the organization of their work and their economic future. A 1985 national survey reported that 84 percent of employees working for organizations without an employee involvement or participation program would like to participate in one if given the opportunity and 90 percent of those in organizations with a plan responded that their company's program was a "good idea."![1]

Other surveys of blue and white collar groups conducted in the early 1980s found similar results. One study found over 80 percent indicated a desire for a say about issues affecting how they did their work, and about the quality of their work, and a majority indicated an interest in having a say about the handling of grievances or complaints, the pace of work, and how technology is used on their jobs.

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[1] Business Week and Sirota and Alper Associates, The 1985 National Survey of Employee Attitudes, New York, Sirota and Alper, September, 1985.

White collar workers[2] in this sample expressed higher levels of interest in participation on all these issues than blue collar workers.

Data from recent focus groups interviews carried out by the Princeton Survey Research Center report that hourly workers, professional and technical employees, and supervisors consistently stated that among the things they value most in a job are variety, freedom to decide how to do their work without close supervision, information and communication regarding things that affect their work and their firm, and evidence that their employers seek, value and act on their suggestions for improvement at their workplace.[3]

Most workers respond favorably when provided opportunities to participate at their workplace. Ms. Deborah Wirtz, an employee at Texas Instruments who testified at the Commission's Houston hearing, described her response to the introduction of self-managed teams in her plant.

> "What I really feel, my honest feelings about teaming, is that my self-esteem has improved as a person. Before teaming, you felt like you were maybe a number that was there to produce the daily quota that was expected of you, and you left and went home. Now we feel like we have the capability of making decisions and being heard."

The changing workforce characteristics reviewed in Chapter I imply that the desire for a voice at the workplace has been growing gradually over time and will continue to increase in the future, since interest in participation tends to rise with education. Rosabeth Kanter summarized these long term trends:

> "A more educated work force -- as ours has become -- is simultaneously a more critical, questioning, and demanding work force, and a potentially more frustrated one if expectations are not met."[4]

Some employees remain highly skeptical and fearful of cooperative programs developed by managers in the absence of an independent union to represent workers' interests. The following statement of Labor Notes, a publication of rank and file union activists, expresses these sentiments:

> "We have deep skepticism toward the notion that workers and management have much in common in dealing with workplace problems. They compete with each other to divide the economic pie, much as companies compete for market share. The idea that they share interests has historically been used to defeat or preempt unions...
>
> Unions remain the only genuine independent employee organizations capable of fighting for the interests of workers on the job."[5]

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[2] Thomas A. Kochan, Harry C. Katz, and Robert B. McKersie, The Transformation of American Industrial Relations, New York, Basic Books, 1986, p. 212.

[3] "Worker Representation and Participation Survey Focus Group Report," Princeton Survey Research Associates, Princeton, New Jersey, April 1994.

[4] Rosabeth Moss Kanter, "Work in America," Daedalus, Vol. 107 (1978), p. 54.

[5] Labor Notes, "The Independence of Labor," A paper submitted to the Commission, October 1, 1993.

Managers and Labor Leaders

A number of managers testified that employee participation and worker-management partnerships are not only desired by workers but essential to being competitive in their markets and industries. Bruce Carswell, Senior Vice President of GTE and Chairman of the Labor Policy Association stated:

> "The message that we would like to leave with you today is that our nation can no longer afford to view the employment relationship as American workers and management competing with one another in a zero-sum game. Instead, we need to create a partnership among empowered employees, government, industry, and unions such that everyone is playing on the same team in pursuit of mutually beneficial objectives.
>
> We hope that the Commission has been given a sense of the sea change that has occurred in human resource practice during the past fifteen years and what the implications of that change should be for policy makers...Over the long term the new high performance American workplace will be better able to provide job security for American employees and a more satisfying work environment...The Commission could make an extremely useful contribution to the development of employment policy if the final report were to communicate to the American public the depth of the change in the workplace environment."

At the Houston hearing, Mr. Charles Nielson, Vice President for Human Resources at Texas Instruments, put it this way:

> "...teaming, effective participation of people in the business process, is an integral part of our survival. I somehow worry that as persons like myself talk, what you hear is a nice-to-do program. Something that's intellectually interesting. Something that probably is appealing to people and makes them feel good. But I'm afraid somehow we're not communicating that it really is the one hope for us to survive in the [competitive] environment I've just described."

The AFL-CIO issued a report, The New American Workplace: A Labor Perspective, that outlines its support for labor-management partnerships for designing new models of work organization:

> "It is incumbent on unions to take the initiative in stimulating, sustaining, and institutionalizing a new system of work organization based upon full and equal labor-management partnerships. Such a system presupposes, of course, partners prepared to deal with each other as equals in an atmosphere of mutual recognition and respect."[6]

Labor leaders appearing before the Commission pointed out that unions provide employees an independent source of power in employee participation. Union-management partnerships are more likely to address a wide range of issues of interest to both employees and managers and lead to a sharing of decision-making at all levels of the enterprise. The labor movement believes that the long run objectives of employee participation should be to enhance both economic performance and industrial democracy by providing employees a voice at all levels of decision-making. The AFL-CIO report stated:

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[6] The New American Workplace: A Labor Perspective. A Report by the AFL-CIO Committee on the Evolution of Work, Washington, DC: AFL-CIO, February 1994.

> "It is unlikely in the extreme that...management-led programs of employee involvement or "empowerment" can sustain themselves over the long term. It is certain that such systems cannot meet the full range of needs of working men and women."

The Collective Bargaining Forum, a group of corporate chief executive officers and international union presidents, has issued two reports in recent years presentinits vision of the type of labor-management partnership needed to pursue the twin goals of competitiveness and a rising standard of living. (See Exhibit II-1.)

Ms. Theresa Roche, Vice President of Human Resources for Grass Valley Group, a medium sized (900 employees) high technology company that designs and produces video equipment, testified at the San Jose hearings that decentralization of traditional managerial responsibilities and the need to train and empower workers to make decisions are especially critical to success in rapidly changing technology driven industries. Ms. Roche, along with several of her colleagues from other high technology organizations, questioned the relevance of traditional labels of "worker" and "manager" or "exempt" and "nonexempt" employees to their industries and organizations:

EXHIBIT II-1

Promoting Joint Approaches to Competitiveness the Collective Bargaining Forum View

To address the competitive challenge...will require a long run outlook and a sustained commitment to joint work among management, labor, and government representatives. Such a commitment also implies:

Adoption of business strategies that can support a high productivity/high wage employment relatinship...In turn, it implies a responsibility on the part of labor to accept the need for continual improvement in productivity, and to commit its energies to the quality of the good and services produced.

[To achieve these goals requires] expansion of and sustained commitment to joint labor-mangement activities, such as training, quality improvement, work redesign, appropriate kinds of cost containment, and related activities that are tailored to the specific needs and competitive conditions of individual enterprises. This implies...an ongoing process of adjustment to changing technology and new work design concepts.

SOURCE: Collective Bargaining Forum, New Directions for Labor and Management, U.S. Department of Labor, 1988.

> "Organizations' continued success require both managers and employees to play profoundly different roles. Employees must now assume many of the responsibilities that once belonged only to managers. They must be better able to direct themselves, be flexible, help make sound decisons and take more accountability for their work and its results."

A large number of employees, managers and union representatives believe that employee participation, work redesign, and worker-management cooperation are essential to being competitive in their industries and markets and to producing the results workers expect from their jobs.

Some employees, however, are skeptical of participation processes in which workers do not have an independent voice or means to represent their interests.

Labor leaders believe the long run objectives of employee participation should be to enhance both enterprise competitiveness and employee voice at all levels of decision-making. They believe these goals are unlikely to be achieved unless employees have independent representation.

3. Extent of Employee Participation and Committees

Surveys of Adoption Rates

There is no entirely reliable census of workplace employee involvement processes, although several recent surveys provide estimates of the current level of activity.

Surveys in 1987 and 1990 of the Fortune 1000 firms by the General Accounting Office (GAO) and the University of Southern California[7] report that 86 percent of these large firms in the manufacturing and service sectors report some experience with employee involvement in their firms. This is an increase from 70 percent in 1987.

Twenty percent of the firms reported employee participation processes that cover a majority of employees in the firm.

The results of a 1991 survey conducted by Paul Osterman of 691 establishments with 50 or more employees[8] are summarized in Exhibit II-2. (See page 35.) It found that 64 percent of these establishments have one or more employee involvement activities covering 50 percent or more of their "core" employees. (Core employees were defined as non-managerial blue or white collar workers directly involved in the production and/or delivery of the establishment's products and services.)

This survey showed that these practices are often combined in various ways, thus Osterman defined significant involvement

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[7] Edward E. Lawler, III, Susan A. Mohrman, and Gerald E. Ledford, Employee Involvement and TQM: Practice and Results in Fortune 1000 Companies, San Francisco: Jossey Bass, 1992.

[8] Paul Osterman, "How Common is Workplace Transformation and Who Adopts It.?" Industrial and Labor Relations Review, Vol. 47, January 1994, pp. 173-88.

Exhibit II-2
Work Practices in Establishments with 50 or More Employees

(50 Percent or Greater Penetration)

	Total Sample (in percent)	Blue Collar Manufacturing (in percent)
One Practice Only	27.1	24.1
Teams Only	14.4	5.5
Job Rotation Only	7.0	11.7
Quality Circles Only	2.6	4.5
Two or Three Practices Combined	31.8	36.9
All Four Practices Combined	4.8	5.0
None of these Practices	33.0	33.3

Source: Paul Osterman, "How Common is Workplace Transformation and Who Adopts it?" Industrial and Labor Relations Review, Vol. 47, January 1994, p. 177.

as having a majority of core employees covered by two or more forms of workplace innovation. Just over one-third of these establishments met this criterion. This survey documented a wide variety of different involvement plans in existence today.

The survey found no significant differences in the frequency of these practices between union and nonunion establishments.

In a 1993 survey of 51 large firms, Organization Resources Counselors reported that between 80 and 91 percent of these firms had committees dealing with either safety and health, productivity, or quality.[9] These companies reported that approximately 25 percent of their employees participated in teams of one form or another.

A survey of predominantly large manufacturing firms conducted by the Labor Policy Association in cooperation with several other industry groups, estimated that 31 percent of the employees in these firms were involved in programs classified as decision-making. Higher percentages were reported to be covered by employee involvement programs that involved collaboration, soliciting ideas, and information sharing (49, 69, and 71 percent, respectively).[10]

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[9] "ORC Employee Involvement Survey," Chicago: Organization Resources Counselors, 1993.

[10] Preliminary tabulations from an employee involvement survey conducted by the Aerospace Industries Association, Electronic Industries Association, Labor Policy Association, National Association of Manufacturers, and Organization Resources Counselors, 1994.

A 1985 survey of a nationally representative sample of the workforce conducted by Sirota and Alper Associates and Business Associates and Business Week found that 36 percent of the respondents worked in organizations that have some type of employee involvement program and 23 percent of the workforce had been personally involved in some form of employee participation.[11]

There is no agreed-upon standard for judging which, or what combination, of these different workplace practices produce results that would warrant the popular label of a "high performance" workplace. Most experts do agree, consistent with the available empirical evidence, that the value of these practices is realized best when combined into a total organizational system that rests on a foundation of trust and combines employee participation, information sharing, and work organization flexibility with reinforcing human resource practices such as a commitment to training and development, gain sharing, employment security, and where a union is present, a full partnership between union leaders and management.

When judged by this systemic standard, estimates of the extent of diffusion of "high performance" employment systems are considerably lower. The Commission on the Skills of the American Workforce and Jerome Rosow, President of the Work in America Institute, each estimate that perhaps less than five percent of American workplaces presently fit this description.

A substantial majority of larger American employers report using some forms of employee participation in their organizations. Many small firms have more informal processes for employee participation. The best available estimates suggest that between one-fifth and one-third of the workforce is covered by some form of employee participation.

A small fraction of these efforts represent the systemic forms of participation consistent with the label of a "high performance workplace."

Studies of Survival Rates

Despite the widespread interest in employee participation and cooperative arrangements, the record shows that some employee participation efforts do not survive long enough to have significant positive economic effects. The Osterman survey showed, for example, that only about one-third of these establishments reported their employee involvement efforts have been in place for five years or more. Edward Lawler and Susan Mohrman report over half of the quality circles begun in the early 1980s failed to survive.[12] Robert Drago found a similar result for quality circles.[13] His results showed a higher survival rate for quality circles in union than nonunion establishments, a finding replicated in a more recent study of labor-management committees in machine shops.[14]

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[11] Business Week and Sirota and Alper, p. 87.

[12] Edward E. Lawler III and Susan Mohrman, "Quality Circles after the Honeymoon," Organizational Dynamics, Vol. 15 (Spring, 1987), pp. 42-59.

[13] Robert Drago, "Quality Circle Survival: An Explanatory Analysis," Industrial Relations, Vol. 27, 1988, pp. 336-51.

[14] Maryellen Kelley, Presentation to the Sloan Foundation Human Resources Network Meeting, MIT, Cambridge, July 1993. Data are available from Maryellen Kelley, Graduate School of Industrial Administration, Carnegie Mellon University, Pittsburgh, PA.

A number of studies have shown that employee involvement is more likely to survive over time if the effort expands beyond the narrow confines of a single program or process and if human resource practices such as compensation, training, employment security, and managerial rewards systems are modified to support these efforts. Where a union is present survival is increased significantly if the process is governed by a joint partnership between the union and management.[15]

Some employee participation efforts are short lived. Others have been sustained over a long enough time to demonstrate their value.

Those most likely to be sustained over time are ones in which the parties broaden the scope of issues addressed, and integrate them with the human resource policies of the organization. Those in unionized settings in which the union is involved as a joint partner with management are particularly likely to survive.

4. Key Features of Workplace Participation Processes

Surveys cannot tell us what these participatory processes actually do, the mix of employees and managers involved in these efforts, how participants are selected, or whether they speak only for themselves or implicitly represent others in the organization. These issues are of special relevance to the Commission since they relate to the legal status of employee participation.

The Commission received considerable testimony on these issues in its national and regional hearings. Some of this is presented to illustrate the range of variation in contemporary practice with respect to these issues.

The examples presented below begin with efforts originally designed to focus on productivity and quality improvement issues, and then move on to examples of self-managing work teams and broader work management committees, partnerships and employee ownership arrangements. Any effort to categorize these arrangements is rather artificial, however, since as the examples will illustrate, they tend to evolve and change over time in ways that are not well captured by their popular labels.

The examples are presented in this sequence, however, since labor law attempts to draw a distinction between processes that deal with production or quality issues, and those that involve wages, hours, or other terms and conditions of employment, and between processes in which employees communicate information to management versus those that involve consultation, shared decision-making, and/or representation.

Production and Quality Centered Initiatives

Many participation efforts focus on quality or productivity improvement. For example, a team from Federal Express composed of both management and non-management employees described how it changed the way packages are sorted in its Memphis distribution center and thereby improved the company's on-time delivery performance, reduced staffing required for this operation from 150 to 80 employees and achieved annual savings of approximately $702,000.

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[15] For reviews of these studies see Eileen Appelbaum and Rose Batt, The New American Workplace, Ithaca, New York: ILR Press, 1994; Gary C. McMahan and Edward E. Lawler, III, "Effects of Union Status on Employee Involvement: Diffusion and Effectiveness," a paper prepared for the Employment Policy Foundation, Washington, D.C., 1994; and Thomas A. Kochan and Paul Osterman, The Mutual Gains Enterprise, Boston: Harvard Business School Press, forthcoming, 1994.

At the New United Motors Manufacturing (NUMMI) operations in California, team members are trained to use a six-step problem-solving process. This process requires team members to explore potential root causes associated with, among other things, the way work is organized, how individuals perform their work, the staffing and scheduling of activities, and other personnel and employment practices. Toyota's manufacturing facilities in Kentucky follow similar training, problem-solving, and kaizen (continuous improvement) processes.

The type of root cause analysis described at NUMMI and Toyota is central to most Total Quality Management (TQM) processes that have become increasingly popular in U.S. industry.

In Atlanta, Bell South and representatives from the Communication Workers of America described how their quality of working life program that carried over from the early 1980s later embraced TQM practices, and has evolved to the point where employees and workers meet with key customers to demonstrate their commitment to total customer satisfaction. Their program, like nearly all the others described to the Commission, entails a strong commitment to training in problem-solving, statistical methods, and related quality practices.

In Louisville, the Commission heard about quality improvement teams at Alliant Health Care Systems. Alliant relies heavily on use of temporary task force teams to solve specific problems that cut across traditional functional and/or hierarchical groups. In response to a question Mr. Rodney Wolford, former CEO of Alliant, described the changing membership and structure of these task forces:

> "When it comes to specific projects or specific improvement efforts, those are typically cross-functional teams made up of front-line workers, with some involvement by management, and certainly a responsibility of management to monitor the process and to be involved to some degree, but not necessarily to run the process.
>
> Often-time those teams may even be chaired by front-line workers who have undergone specific training to be able to manage the team process. In terms of who goes on those teams, it's simply what makes sense representatives of all the various functions that may be involved or have some ownership accountability to any aspect of the process."

In San Jose, the Commission heard testimony from small and large high technology firms working to embed participatory principles into their organizational cultures through a wide variety of practices. Again, a common practice in these firms is to use temporary task forces or teams made up of a diverse cross section or a "vertical slice" of employees and managers. Ms. Deborah Barber, Vice President of Human Resources at Quantum Corporation, described the fluid nature of assignments in her corporation:

> "High performance groups are assembled to address specific needs, whether the need is in design or manufacturing or sales and marketing or distribution, and since many of these high performance work groups are associated with the management of a particular process or product, they need to

Exhibit II-3

Self-Managed Teams at D.D. Williamson and Company

We have eliminated all supervisory positions and we have gone to self-managed work teams. Our Louisville plant runs 24 hours a day, five days per week. Shift leaders and teams were chosen by the associated themselves in something similar to a baseball draft. And team leaders rotate on a semi-annual basis. Along with the increase in responsibility, there's an extensive training. For the most, associates can now do several tasks ...The work teams are also responsible for their own hiring and firing. We have some base education and personality screens that we use but after that the team does the interviewing and the team does the hiring.

Two years ago....we began a program to see that all associates visit our customers. And many times it required an overnight stay.

> be constantly reconfigured and reassembled as the products and processes change."

While the survey evidence suggests that formal participation arrangements are more prevalent in large than small establishments, the Commission heard testimony from small employers about the diverse and informal ways these principles are applied in their organizations. For example, Ms. Cheryl Womack, Chief Executive Officer of VCW, Inc., a 75-person insurance company in Kansas City, described a wide range of informal communications, rewards, quarterly meetings, and advisory committees in her firm. She stressed particularly, the importance of the communications that flow out of breakfast meetings company officers hold each month with the winner of their "employee of the month" program.

Both temporary and ongoing production and/or quality focused efforts often expand over time to address issues that fall within the category of terms and conditions of employment.

The principles underlying TQM encourage team members to explore root causes of problems and alternative solutions that involve human resource practices and policies.

Quality improvement teams often mix together individuals from different hierarchical levels and functional groups in ways designed to overcome traditional status distinctions and job definitions.

Over time it becomes increasingly difficult if not impossible to draw a line between production issues and employment practices, and among "employees," "supervisors," and "managers" in the most successful productivity and quality improvement efforts.

Self-Managed Work Teams

As illustrated above, some employee participation processes that begin as production or quality focused problem-solving groups evolve over time to take on issues and responsibilities that in the past would have been handled by a supervisor or manager. In self-managed work teams a number of duties traditionally reserved to managers are explicitly delegated to team members. At the Louisville hearing, for example, Mr. Ted Nixon, CEO of D.D. Williamson and Company in Louisville, a food processing manufacturer of caramel colored products with 105 employees, described the responsibilities of the self-managed work teams in his company. (See Exhibit II-3.)

Self-managed work teams take on responsibilities traditionally performed by supervisors and managers and may deal with a variety of issues that affect wages, hours, and other terms and conditions of employment.

Workplace Committees and Partnerships

A variety of firms and labor organizations described their efforts as full-fledged partnerships and committee structures. Some of these focus on specific issues such as safety and health while others address a wide range of issues and span multiple levels of the organization.

Safety and Health Committees

Among the most longstanding and widespread types of issue specific committees found in American workplaces are those that focus on monitoring and improving workplace health and safety. According to the 1993 survey of the National Safety Council, workplace safety and health committees are found in 75 percent of establishments with 50 or more employees and in 31 percent of establishments with less than 50 employees. This study also reported that safety and health committees exist in 89 percent of unionized establishments and 56 percent of nonunion establishments.[16] Under collective bargaining, union safety and health committees often have access to union-provided professional experts to assist in these matters. The role of committees or other approaches to employee participation in safety and health will be discussed in more detail in Chapter IV.

Multi-Employer and Union Committees

A distinctive feature of collective bargaining in some industries or regions has been the creation of multi-employer-labor union committees. These committees address a variety of workplace problems that can be more effectively handled on a multi-employer level than within an individual enterprise. Such committees have existed since the earliest days of collective bargaining and have been concerned with issues such as training, health and safety, grievance handling, and productivity. Examples have occurred in industries such as anthracite mining, electrical contracting, men's and women's clothing, retail food stores, and longshoring.

Broad-ranging Committees

In a number of union and nonunion firms, employee participation and labor-management cooperation processes take on a variety of issues and are overseen by one or more committees.

Ford Motor and the UAW have had an employee involvement and labor-management cooperation program in place since 1979. (See Exhibit II-4 page 58) They summarize the key lessons learned over this period as follows:

> The Ford-UAW experience has demonstrated two especially sig-

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[16] Thomas W. Planek and Kenneth P. Kolosh, "Survey of Employee Participation in Safety and Health," Itasca, IL: National Safety Council, October 1993. A similar estimate of the frequency of safety committees is reported in the Labor Policy Association survey.

nificant lessons about joint programs. The first is that leadership, trust and funding are critical ingredients -- not structure. The second is that an evolutionary approach, progressing from fairly simple applications to those that are more comprehensive and integrated, is important to create and to sustain large-scale transformation.

Peter Pestillo added another point:

> "If management wants unions to help make companies more competitive and to be an ally in the struggle with foreign competitors, management must accept the validity of employee chosen unions as a legitimate institution in our society. Management must accept this union role, must honor it, must value it, must work with it. A strong alliance requires two strong members. There should be no quibbling about that."

The National Steel Company and the United Steelworkers described the evolution of their partnership as one that now goes from the shop floor to the corporate board room. Steelworkers' former president Lynn Williams commented on how his union extended the approach used at National Steel to other major steel companies in their 1993 negotiations:

> "We have in our minds closed the circle by including board membership. We're not taking over the boards of these companies...but we are going to have one person on each of these boards there to represent the general interest of the worker constituency. [W]e'll be functioning at every level of the company."

AT&T and the CWA described a similar integrated partnership they call the "Workplace of the Future" that is built on extensive employee involvement and team systems at the workplace, consultation at the business unit level where long term competitive issues are discussed, and a corporate-wide human resource council that includes labor, management, and outside experts in discussion of long range plans.

William Ketchum, Vice President of AT&T, described Workplace of the Future as a "framework for change which includes unions as joint partners in planning and implementing change based on mutual respect and mutual gain." Morton Bahr, the president of the Communication Workers of America, testified that "the critical element of success" is that for workers to effectively participate in workplace decision-making, front-line workers must first have their own organizations, educated leadership and significant resources in order to have the confidence and preparation to participate as equals and without fear.

At the Commission's Michigan hearing, Miller Brewing Company and representatives of the UAW described how they jointly planned and designed a team-based highly participative work system in a new plant. The management system of this plant includes union representatives at all levels of the organization. (See page 58 for Exhibit II-4.)

Several nonunion firms described enterprise-wide councils or committees in their organizations. In Michigan, a team from Donnelly Corporation described their longstanding (established in the 1950s) Scanlon Plan that has since expanded to include an employee council that not only reviews employee suggestions but consults on the full range of human resource policies. Donnelly's system is described in Exhibit II-5. Another Scanlon Plan that has been in place for over thirty years at Herman Miller

Corporation is also described in Exhibit II-5. (See page 59)

At the Boston hearing, the Commission heard accounts of the events that led to the termination of a longstanding and broad ranging employee committee at the Polaroid Corporation.

Mr. MacAllister Booth, the Chief Executive Officer of Polaroid Corporation, described his frustration with his decision to disband an elected employee committee that had been in place since 1949 after an employee filed charges with the Department of Labor over the legality of the company's procedures for electing the committee's officers. The elected representatives of this committee discussed the full range of personnel practices and policies at Polaroid. Subsequently, a charge also was filed with and a complaint issued by the National Labor Relations Board finding the committee violated Section 8(a)(2) of the National Labor Relations Act banning company dominated organizations.

Following the Labor Department charge, and in anticipation of the 8(a)(2) charge, the company disbanded the committee and in its place Polaroid established an Employee Ownership Influence Council which serves as a "focus group" for communications between employees and managers. This new entity has considerably less power to review and consult on employment policies and practices than the disbanded employee committee. This case raises the issues of what companies can do within the law to establish committees of workers to resolve problems. The mutual frustrations of Mr. Booth and Ms. Charla Scivally, the employee who filed the complaint, are summarized in Exhibit II-6. (See page 60)

Consultation in Japan

Labor-management consultation forums exist in over 70 percent of Japanese firms and establishments. In contrast to European works councils, these operate in the absence of any formal statutory obligation. Instead, they have been promoted by the Japan Productivity Center as a means for, among other things, discussing the relevance of macro economic trends and performance to the wage and other policies of specific enterprises. Professor Haruo Shimado from Keio University in Japan indicated that consultation now covers a wide variety of issues ranging from safety and health to new technology and investment plans and is viewed by both employer and worker representatives as an essential component of Japan's industrial relations system.

Australian Strategies for Workplace Reform

In the mid-1980s the Australian Conferation of Trade Unions (ACTU) conducted an international study that produced a new strategy promoting union mergers and consolidations, work restructuring, commitment to training and development, decentralization of wage setting and collective bargaining, and labor-management consultation.

Between 1987 and 1991 Australia's Industrial Relations Commission issued decisions calling for enterprise level bargaining over work restructuring and pay systems that reward skill attainment and productivity improvement and labor-management consultation. In 1991 the federal government initiated a "Best Practices" program that provides grants and awards to firms and unions to promote workplace reforms. In 1993 the requirement for consultation was enacted into federal law.

The Australian approach involves legal requirements for safety and health committees, incentives and recommendations for workplace reforms, enterprise wage agreements, and labor-management consultation in return for greater flexibility and decentralization in wage determination, and a "Best Practices" recognition and grant program. These reforms have produced the following results to date:

- Approximately 40 percent of Australian workplaces, covering 65 percent of the workforce are covered by safety and health committees;
- Quality management techniques that rely on employee involvement are found in 26 percent of the workplaces;
- The greatest amount of workplace reform has occurred in workplaces with an active union presence; and
- Managers report consultation has resulted in improvements in management-employee relations in 90 percent of the workplaces, improvement in the process of introducing change in 81 percent, and improvements in productivity in 70 percent.

Works Councils in Europe

Works councils are elected bodies of employees who meet regularly with management to discuss establishment level problems. Works councils are widespread in Europe because most countries require them by law, if employees indicate an interest in creating such a body. In Germany, for example, if employees want one, an establishment with five or more employees is required to have a council that is elected to represent the entire workforce in the establishment. This does not mean that all workplaces have them, for in many smaller enterprises, employees and managers choose less formal modes of communication and consultation. The prime difference between the U.S. and Germany in this respect is that workers can "trigger" the formation of councils.

Exhibit II-7 summarizes some of the key features of works councils presented to the Commission at its meeting on international experiences. (See page 61)

Some workplace committees and labor-management partnerships address a wide range of employment and managerial issues while others are focused on specific topics such as workplace health and safety.

In some cases these structures cover individual establishments. Others are enterprise-wide and few cover an entire sector in a community or nationally.

Establishment or enterprise-wide committees that cover the full spectrum of work-place issues are more prevalent in unionized companies. However, examples of such structures are found in some nonunion firms as well.

Committees in nonunion firms operate with some uncertainty over their legal status.

Establishment or enterprise-wide consultative arrangements are less widely diffused in the U.S. than in firms in Japan, Australia, or in European countries with works council legislation.

Employee Ownership

Employee stock ownership plans (ESOPS) have increased in recent years to the point where they now are estimated to cover as much as 11 percent of the labor force. While all ESOPS provide employees with a direct financial stake in the economic performance of their enterprise, the vast majority are mainly contingent compensation plans and do not provide any role for employees in firm governance (beyond the voting rights associated with share ownership). Some of these have been established to achieve the favorable tax treatment available to such plans or to help ward off the threat of a hostile takeover.

Other ESOPS, such as those at Lincoln Electric or the Bureau of National Affairs, have been in existence for many years, include extensive employee participation and a formal role for employees in the governance of the firm. ESOPS that provide for employee participation and representation in firm governance perform better than those that do not. The empirical evidence on the effects of ESOPS on firm performance can be summarized as follows.[17]

1. No studies show that ESOP plans reduce productivity or profitability.

2. Some studies show that ESOPS are associated with higher performance compared to non-ESOP firms or compared to the same firms prior to the introduction of the ESOP. Some of these estimated effects, however, are not significant and are sensitive to changes in the statistical modes and tests used.

3. ESOPS are more likely to be associated with higher performance when combined with participation of employees at the workplace than when there is only representation of employees on the board of directors.

ESOPS have grown in recent years. While some include a role for employees in organizational governance and/or workplace participation, many do not. Those that include employee participation appear to perform better than those that do not.

General Patterns

These are only some of the examples described in Commission hearings and in the materials submitted to the Commission. This evidence suggests the following general conclusions regarding what these committees and employee participation processes do and who is involved in them.

1. There is no single dominant form of employee participation today. While many efforts began with a focus on productivity and or quality improvement, most of those that endure over time go on to address other workplace issues as well. Some address a variety of terms and conditions of employment such as training, safety and health, communications and information sharing, employee selection, performance evaluation, work assignments/rotation, job descriptions and procedures, staffing levels, work hours and scheduling, overtime, pay system design and administration, discipline, and grievance resolution. Some deal with issues traditionally reserved to management and supervision such as customer service, new plant design, design and implementation of new technologies, equipment, or products, and long-range human resource planning.

2. Some workplace participation efforts are ongoing while others are temporary task forces established to solve specific problems and then disbanded or reconstituted for other purposes. In some cases, employees participate in these processes while continuing working in their regular jobs or participation becomes a normal part of the job itself. In other cases employees may be asked temporarily to serve as facilitators or team leaders in a fashion traditionally reserved for managers or supervisors. In some cases their primary co-workers are peers doing similar work while at other times they work in cross-functional task forces that mix together hourly employees with technicians, professionals, and managers. Sometimes the work may be on-site during regular work hours but in cases where customer service or external benchmarking are involved, it may require travel and irregular hours.

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[17] Michael A. Conte and Jan Svejnar with Comments by Joseph R. Blasi, "The Performance Effects of Employee Ownership Plans," in Alan S. Blinder (ed.) Paying for Productivity. Washington, D.C.: The Brookings Institution, 1990, pp. 143-82.

3. Few of these efforts remain constant over time. Those that endure over time often expand or modify the issues included and the personnel involved. Indeed, the lines separating production, employment, and managerial issues are often impossible to draw or to enforce in the most successful programs.

4. Participants are chosen for these processes in various ways. In some cases individuals volunteer to participate in problem-solving teams. In other cases management selects team or committee members, however, there are also some cases where employees elect representatives. In union-management committees it is customary for the union leaders to arrange for the selection or for unions to elect their representatives.

5. The line between communication and shared decision-making is difficult to draw in these processes. In some cases decision-making authority is delegated to the teams; in others committees make suggestions that are advisory to management, and in other cases, committees consisting of employees and managers make decisions and allocate resources. Regardless of their formal authority, workers and managers tend to remain committed to these arrangements only if they believe they are exerting a constructive influence on the issues involved.

6. These features all make it difficult to draw a clear distinction between "exempt" and "nonexempt" employees as defined in various labor and employment laws and regulations.

5. The Effects of Employee Participation on Economic Outcomes

The Commission received considerable testimony on the effects of employee participation efforts and reviewed the case studies and quantitative research on these efforts. The evidence to date suggests that many programs improve the quality of work life and in some cases raise productivity and product quality. More specifically:

1. One by-product of employee participation is to increase investment in education and training of the workforce. This point was made in almost every case described to the Commission. This is also consistent with the evidence in the Lawler, et. al., Osterman, ORC, and other studies.

2. While most of those testifying about their efforts reported their programs resulted in improved productivity, quality, or some other indicators of economic performance, the empirical studies on this issue completed to date show mixed results.

Some of these efforts fail to survive long enough to produce significant economic gains. Studies that have attempted to isolate the individual effects of single programs such as quality circles or teams tend to find small or insignificant effects on performance.[18] One study found that union companies with joint committees use significantly less production time per unit of output than nonunion companies with such committees.[19] Other studies have suggested that employee involvement or gain sharing under collective bargaining has greater effects when the union supports the effort and jointly administers the program.[20]

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[18] Harry Katz, Thomas A. Kochan and Jeffrey H. Keefe, "Industrial Relations and Productivity in the U.S. Automobile Industry," The Brookings Papers on Economic Activity, Vol. 3, 1987, pp. 685-728.

[19] Maryellen Kelley and Bennet Harrison, "Unions, Technology, and Labor-Management Cooperation," in

The largest positive effects on economic performance have been found in studies that measure the combined effects of workplace reforms (i.e., where participation is combined with changes in employment practices, manufacturing policies and management structures and decision-making procedures).

Studies examining these systemic forms of workplace change at Xerox, in an international sample of auto assembly plans, and in a sample of plans in the steel industry all conclude that the more systemic the involvement efforts, the greater the economic benefits.[21]

Another exhaustive review of all the studies of employee participation and work redesign that were carried out since the 1970s reached a similar conclusion with respect to the effects of participation on various economic and psychological results.

A study of the effects of human resource management innovation on profits and returns to shareholders found similar results, namely, the more comprehensive the human resource innovations, the greater their economic effects.[22]

Thus, broad based workplace innovations that remain in place over an extended period of time and are integrated into a system's approach to workplace innovation and change produce the most improvements in economic performance.

3. The effect of these efforts on employment security is limited, at best. Many of the organizations that have initiated these efforts did so in response to an economic crisis so it is difficult to determine what would have happened to job growth or loss in the absence of these efforts. But clearly, employee participation or workplace committees alone do not necessarily produce new jobs. However, we did receive testimony from a number of people indicating that market share improvements resulted that created or maintained jobs, and from others that new investment was authorized because of the improved relationships and economic effects of these programs. Phillip Morris, Saturn Corporation, Ceiba Gigy, Miller Brewing Company, and others were all cited as cases where new jobs were

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Lawrence Mishel and Paula Voos (eds.), Washington, D.C.: Economic Policy Institute, 1992.

[20] Roger T.Kaufman, "Effects of Improshare on Productivity," Industrial and Labor Relations Review, Vol. 45, No. 2 (January 1992), pp. 311-322; William Cooke, "Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management Administration," Industrial and Labor Relations Review, Vol. 46, No. 1 (October 1992), pp. 119-134.

[21] Joel Cutcher Gershenfeld, "The Impact on Economic Performance of a Transformation in Workplace Practices," Industrial and Labor Relations Review, Vol. 44 (January 1991), pp. 241-60; John Paul MacDuffie and John F. Krafcik, "Integrating Technology and Human Resources for High-Performance Manufacturing: Evidence from the International Motor Vehicle Research Program," in Thomas A. Kochan and Michael Useem (eds.) Transforming Organizations. New York: Oxford University Press, 1992, pp. 209-26; Casey Ichinoiski, Kathryn Shaw, and Giovanna Prennushi, "The Effects of Human Resource Management Practices on Productivity, unpublished paper, Carnegie Mellon University, March 1994.

[22] Mark Huselid, "Human Resource Management Practices and Firm Performance," unpublished paper, Institute of Management and Labor Relations, Rutgers University, June 1993.

created as a direct result of cooperative efforts.

6. Will Contemporary Efforts at Employee Participation and Cooperation be Sustained and Diffuse Across the Economy?

> "If these efforts work so well, why aren't they adopted more widely? Do they constitute a real change in work relations or another management fad?"

These are big questions facing this Commission and others concerned with the American Workplace. A bit of history will help explain these concerns.

Earlier Examples of Committees

The period since the 1980s is not the first time American industry experienced an increase in the use of worker-management committees. Indeed, worker-management cooperation has ebbed and flowed at various points in history both under collective bargaining and in nonunion workplaces.

In earlier years these arrangements were often called "employee representation plans," "works councils," or "shop committees." Among the earliest of these works councils, outside of collective bargaining, was one established at the Filene's store in Boston in 1898. Employee committees were elected and a board of arbitration heard any matter brought by an employee. The employees' association owned a large block of company stock and nominated persons to the Company board of directors.[23]

Historically, employee representation and participation plans, outside of unions, have involved in varying degrees three themes: more efficient production and higher quality; workplace democratic values and participation; and discouragement of "outside" labor organizations.

During World War I the National War Labor Board required the establishment of shop committees where unions did not exist. The American Federation of Labor (AFL) initially viewed these committees as a possible step in the evolution of unions. In the post-war period of conflict, however, the AFL stated at its 1919 convention:

> "We heartily condemn all such company unions and advise our membership to have nothing to do with them; we demand the right to bargain collectively through the only kind of organization fitted for this purpose, the trade unions."

Employee representation plans and shop committees, outside of collective bargaining, grew during the 1920s. By 1924 virtually all the plans started by the government in World War I were abandoned or superseded by plans drawn up by employers themselves. By 1928 there were 869 plans in 399 companies with 1.5 million employees. The depression after 1929 eliminated many of these plans except in the largest companies. In 1933 and 1934 employee representation plans expanded.

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[23] Lescohier, Don D., "Employee Representation or Company Unions," in John R. Commons (ed.) History of Labor in the United States, 1896-1932, Vol. 3. Working Conditions. New York: MacMillan, 1935, p. 337.

As will be described in more detail later, employer dominated committees or "company unions" were outlawed by the National Labor Relations Act in 1935 and by the 1934 amendments to the Railway Labor Act.

Labor-management committees devoted to workplace problems under collective bargaining also have a long history. Instances of labor-management cooperation in the 1920s and 1930s were most noteworthy in the men's and women's garment industries on various railroads such as the Chesapeake and Ohio and Baltimore and Ohio, and in the Naumkeag Steam Cotton Company.[24] Beyond these cooperative programs addressing costs and competitive conditions, many collective bargaining relationships historically included provisions for cooperative activities on a wide range of workplace and industry issues such as safety, quality, and training.

Most of these examples from earlier periods took the form of indirect participation or representation (i.e., they involved workers selected by management or elected by employees to represent them in consultations or negotiations with management over a variety of enterprise issues). Few were as focused on direct employee participation and work redesign as are contemporary initiatives.

This history adds considerable controversy and concern to current debates over employee participation and labor-management cooperation.[25] Some critics believe that today's participation efforts are in some ways an effort by employers to return to the past whereby weak forms of management controlled participation and representation are substituted for independent forms of worker voice. Some skeptics also believe that the changes occurring at the workplace today are merely another in a long history of temporary fads that will ebb and flow as did past episodes of labor-management cooperation.

History tells us that labor-management cooperation in the U.S. tends to periodically ebb and flow. It is hard to sustain in the American environment and institutional setting, and often fails to diffuse widely across the economy.

Obstacles to Diffusion of Contemporary Practices

If American history indicates that sustaining and diffusing cooperation is difficult, and the current data suggest that participation is now partially diffused, the logical question becomes:

> "What will influence the staying power and diffusion of contemporary forms of employee participation and worker-management cooperation?"

A number of managers testified that market pressures will force firms to adopt these practices.

Employee participation is more widespread in industries exposed to international and domestic competition than in industries with less competition.[26] However, within all industries, a considerable number of firms and employees do not have any significant amount of employee participation or workplace committees. Once the effects of product and labor market competition are controlled, the evidence suggests that size of firm, managerial values, the type of competitive strategies adopted by the firm, the relative influence of human resource considerations in top management decision-making, and in unionized settings, the extent to which the union is involved as a joint partner, all influence whether employee participation will be adopted and sustained over time.[27] Thus, managers, and in collective bargaining relationships, managers and union leaders, have considerable discretion over whether or not to initiate and sustain these workplace innovations.

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[24] Sumner Slitcher, Union Policies and Industrial Management. Washington, D.C.: The Brookings Institution, 1941.

[25] David Brody, "Section 8(a)(2) and the Origins of the Wagner Act," paper presented to the Commission, January 6, 1994.

[26] Kochan and Osterman, The Mutual Gains Enterprise; McMahan and Lawler, "The Effects of Union Status on Employee Involvement."

While there is no clear consensus on what keeps workplace innovations from spreading more widely, some of the most frequently mentioned factors are summarized below in order to stimulate further discussion on this vital question.

Lack of Trust

Workers must trust management to use the fruits of worker participation to benefit employees as well as shareholders.

Data obtained in a series of recent focus group interviews conducted by the Princeton Survey Research Center provides insights into the sources of employee skepticism. Consistent with the evidence on workers views summarized earlier, most of the employees in these focus groups responded positively to the idea of employee participation around quality and general organizational improvement. Moreover, many examples of successful quality improvement programs were cited and evaluated favorably by the focus group participants. But many also noted that too often in their experience top management fails to follow through and stay committed to these efforts. Suggestions are not taken seriously or implemented, or the initial commitment to TQM fades as customer pressures to implement these programs fade. Those with such experiences expressed considerable distrust of their managers. These interviews suggest that some employees view these initiatives with a rather skeptical eye based on their past and current experiences.

For workers the biggest fear is that employee participation and productivity improvement will result in the loss of their jobs. At the San Jose hearings, Mr. Romie Manan, an employee of National Semiconductor, told of how he and his fellow employees were bitter about being laid off after contributing ideas to improve productivity of his operations. The company was now planning to transfer this work to a new plant in another state:

> "The company claims that these teams give us a voice in running the plant and a place where we can talk about our problems. In reality, however, in these groups, all the company ever wants to talk about are ways to make National more productive, more efficient, and more profitable.
>
> Over the past seven or eight years, our company has shifted production from our plant to lower wage plants in Arlington, Texas and Portland, Maine. Thousands of my fellow workers on the fab lines have lost their

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[27] See McMahan and Lawler, "Effects of Union Status on Employee Involvement," and Kochan and Osterman, the Mutual Gains Enterprise.

> jobs in this process. I will lose mine too, next week after working many years in that factory."

Some middle level managers, first-line supervisors, and workers also are skeptical of management's motives or fear that these initiatives are just another passing managerial fad. One survey of middle level managers reported that 72 percent of these managers felt employee involvement was good for their company, 60 percent felt it was good for rank and file employees, but only 31 percent felt it was good for them.[28]

Some union leaders distrust managers' motives because they see employee participation initiatives as union avoidance techniques. This distrust has deep historical roots. As noted earlier, union avoidance has historically been one of several factors motivating management to implement workplace committees. Union avoidance has also been documented as one, but not the sole, motivation for some of the workplace innovations introduced by nonunion employers in the current period as well.[29]

Union leaders are sometimes asked to support and participate in cooperative efforts in one facility at the same time an employer with multiple facilities opposes union representation in others, often newer worksites. This has been a major factor chilling the diffusion of employee participation in unionized facilities and holding back

Exhibit II-8

AFL-CIO Principles for Labor-Management Partnerships

First, we seek partnerships based on mutual recognition and respect...A partnership requires management to accept and respect the union's right to represent the workers in units already organized and equally to accept and respect the right of workers in unorganized units to join a union.

Second, the partnerships we seek must be based on the collective bargaining relationship. Changes in work organizations must be mutually agreed to -- and not unilaterally imposed -- and must be structured so as to assure the union's ability to bargain collectively on behalf of the workers it represents on an ongoing basis.

Third, the partnerships must be founded on the principle of equality. In concrete terms, this means that unions and management must have an equal role in the development and implementation of new work systems.

Fourth, the partnership must be dedicated to advancing certain agreed-upon goals reflecting the parties' mutual interests.

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[28] Janice Klein, "Why Supervisors Resist Employee Involvement, Harvard Business Review, Vol. 62 (September-October, 1984), pp. 87-95.

[29] Fred Foulkes, Personnel Policies in Large Nonunion Firms (Englewood Cliffs, NJ: Prentice Hall, 1980; David W. Ewing, Justice on the Job, Boston: Harvard Business School Press, 1989.

labor leaders from becoming more active and visible champions of employee participation. It is not coincidental, for example, that the union leaders who appeared before the Commission in support of worker participation with individual companies such as AT&T, Phillip Morris, National Steel, Scott Paper, and Miller Brewing were all cases where the issue of union representation in new facilities had been worked out to the parties' mutual satisfaction.

Some managers likewise distrust or are skeptical of union leaders' ability to support cooperation and employee participation, believe unions will hold cooperation hostage to achieve other objectives, or are unwilling to share information and power with union leaders in the belief that the company will be "contractually" bound to continue joint decision-making in the future.

A number of individual unions, including the Steelworkers, CWA, the Amalgamated Clothing and Textile Workers, and the Grain Millers, have recently publicly endorsed employee participation and labor-management partnerships as an explicit policy and objective. As noted earlier, the AFL-CIO recently did so as well. The principles it believes should guide these partnerships are summarized in Exhibit II-8. Whether these principles will be accepted by employers and provide a basis for overcoming the mutual skepticism and mistrust between some labor and management leaders are questions worthy of further discussion.

Economic Factors. Building a trusting relationship between workers and employers so that workers are highly motivated and contribute their ideas to the firm constitutes a long term investment. Thus, it is no surprise that management surveys report layoffs and downsizing are the single biggest threat to the continuity of employee participation in industry today.[30]

Employee participation and related workplace changes entail high start-up costs for training, consulting services, and management and employee time away from "normal" activities. Yet the benefits are not likely to be realized until some time in the future and often are difficult to predict or to measure. This often produces conflicts within management between advocates for these changes and those who want to measure their costs and benefits of these efforts before the benefits are realized. Indeed, the Labor Policy Association reported that other managers were a more significant source of resistance to employee involvement efforts than were employees or unions. Specifically, among those reporting their efforts had been less successful than expected, 42 percent cited management resistance, 39 cited employee resistance, and 28 percent cited union resistance as a problem.

Some executives report that the investment community has little knowledge or understanding of workplace innovations. Others go a step further and argue that pressures for short term results from the financial community coupled with the lack of information on the benefits of workplace innovations and the high up-front costs of these efforts produce a systematic under-investment in these initiatives.

In businesses where employee turnover is routinely high, where the education of workers is low, or where the technology of jobs is such that employee participation is unlikely to add much to economic performance, participation may not spread no matter how much it succeeds in other areas.

Employee Options to Initiate Participation. The vast majority of employee participation efforts have been initiated by senior managers. Lawler et. al., for example, reported that the stimulus for employee involvement came from employees in only 18 percent of the cases.[31] In nonunion settings, management traditionally retains control over whether to initiate, change, or abandon employee participation. Outside of union settings, employees have little independent means for initiating these efforts.

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[30] Lawler, Mohrman, and Ledford, Employee Involvement and TQM.

Surveys consistently find that over 80 percent of American workers want a say in decisions affecting their jobs and how their work is performed. A recent survey by the Gallup Organization and the Employee Benefit Research Institute found that 83 percent agreed or strongly agreed that most companies do not give workers enough say in decisions that affect them.[32] Combining these percentages with the number of workers not now covered by some form of participation process, this implies that there may be as many as 40 to 50 million workers who want to participate in decisions on their job but lack the opportunities to do so.[33]

The focus group interviews again provide some insight on the difficulty employees have in acting on their preferences for greater involvement. Most participants felt that their managers would feel threatened by efforts of employees to propose formation of groups or teams to solve problems. Some feared retaliation. Others believed their employers would view this as an effort to organize a union and this would put at risk the jobs or careers of leaders of this type of effort. Others simply expressed a sense of futility about their ability to initiate changes that did not have the active support of their supervisors or top management. Taking the initiative to propose changes in ways that went beyond individual efforts and involved any group or collective process was seen by most participants as risky or futile.

Government Policy and Legal Issues

The international evidence presented to the Commission documented that governments can and do promote diffusion of workplace reforms in a variety of ways. Australia and several Canadian provinces require safety and health committees. European countries require work councils if employees express a desire for them at their workplaces. The Japanese Productivity Center encourages and supports labor-management consultation through its data gathering, information dissemination, and related activities. The Australian "Best Practices" program, along with its national arbitration awards, encourage consultation and workplace reforms.

The U.S. Government has no program of a magnitude, visibility, or impact that comes close to any of these international approaches.

Labor law casts a cloud that some believe limits the scope of participation. Seventy-six percent of the managers who responded to the Labor Policy Association survey indicated their organization saw significant problems with the government's views of employee involvement programs. Sixty-eight percent indicated that the government's views either are of concern to them (45 percent) or are making them more cautious about broadening existing or implementing new programs (23 percent). Those most vulnerable to legal challenge are precisely those that take a broader, more systemic approach to participation that the evidence suggests have the greatest long term positive effects on economic performance.

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[31] Lawler, Mohrman, and Ledford, Employee Involvement and TQM.

[32] Daily Labor Reports, February 25, 1994, A-3.

[33] This estimate was calculated as follows: 111 million wage and salary workers - 19 million government employees = 92 million private sector wage and salary workers. 92 million (.88).(67)(.80) = 43.4 million. .88 = percentage of private sector non union work force; .90= percent expressing a desire to participate on issues normally covered in employee participation processes. This calculation assumes all union members have access to participation through their collective bargaining representatives. Relaxing this assumption and including both the union and nonunion labor force in the calculation increases the estimate to 49.3 million private sector workers. (92)(.67)(.80) =49.3 million.

7. Legal Issues Regarding Workplace Employee Participation

Section 8(a)(2) of the National Labor Relations Act makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it." In turn, Section 2(s) of the Act defined "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The underlined phrases indicate how broad and how important Congress intended this legal prohibition to be.

The stated aim of the NLRA is to encourage collective bargaining through representatives of the employees' own choosing. Unions whose activities are limited to employees at a single firm are perfectly compatible with this policy as long as they are not created or controlled by management. The law says employees may not be exposed to employer-dominated structures that "deal" with "conditions of work." Congress' assumption, based on the experience with the employee representation plans of the 1920s reviewed earlier, was that the presence of such company-dominated unions would unduly influence employees in their judgment about whether they needed and wanted to be represented by an independent union.

Only during representation election campaigns is it illegal under the NLRA for employers to unilaterally grant benefits to employees.[34] Management-created representation plans are illegal at any time.[35]

By the end of World War II, Section 8(a)(2) was generally conceded to have eliminated as a significant phenomenon the form of "company unionism" that had developed prior to the enactment of the NLRA. Though Congress chose not to relax this provision in the 1947 Taft-Hartley amendments to the NLRA, the principal use of Section 8(a)(2) from the mid-1940s to the mid-1970s was to bar employers from recognizing minority unions, to require company neutrality between two unions seeking to represent its employees.

In the late 1970s and early 1980s, several legal controversies arose about the original intent and contemporary relevance of Sections 8(a)(2) and 2(5) of the NLRA. A closely-divided National Labor Relations Board found that employer participation in grievance adjudication committees constituted performance of management functions on behalf of their employer, rather than representation of employees in dealing with the employer (Mercy-Memorial Hospital (NLRB), 1977)). That same year, a unanimous Board panel concluded that a job enrichment program under which production employees were divided into small teams, that by consensus divided up their own work and overtime assignments, did not constitute illegal "dealing with" the employer about conditions of work (General Foods (NLRB, 1977)). Meanwhile several appeals court panels, most conspicuously on the Sixth Circuit (e.g., in Scott and Fetzer (6th Cir. 1984)), were giving narrower reading to the key statutory terms "labor organization" and "employer domination." A sentiment that ran through several of these judicial opinions was that the adversarial conception of the employment relationship that had led to the 1935 Wagner Act was incompatible with the cooperative relations that were necessary in the modern economic and human resource environment.

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[34] The Supreme Court so held in Exchange Parts (1964).

[35] Or so the Supreme Court appeared to rule in its two major decisions interpreting this statutory policy: in Newport News Shipbulding & Drydock (1938), regarding the Section 8(a)(2) concept of "employer domination"; and in Cabot Carbon (1957) , regarding the Section 2(5) phrase "dealing with".

The topic returned to the national legal agenda with the Electromation case of 1992. Management of Electromation, reacting to employee displeasure about the company's new pay and attendance policies, established five committees to address these and other issues such as pay progression, no smoking, and the communication network. The committees were principally comprised of employees selected by management from volunteers, along with one or two supervisors or managers. The committees began to meet weekly to talk about these subjects. However, after the Teamsters Union surfaced with a petition to represent the employees, the company campaigned actively against union representation of the workers and announced that it would not continue with the committee format until after the NLRB-conducted election. Shortly before the election a Section 8(a)(2) charge was filed with the NLRB along with a Section 8(a)(1) charge alleging unlawful employer interference with the election.

The Board scheduled the case for special oral argument at which a variety of employer groups argued that Sections 8(a)(2) and 2(5) do not apply to these forms of employee involvement. However, the four members of the Board were unanimous in finding a violation of the Act in the circumstances of this case. Though they authored four different opinions explaining their respective views about the relevant legal principles, their decision in this case reinforced the traditional board interpretation of this feature of the NLRA, rather than accept a narrower view that would exclude most or all employee involvement programs found in many workplaces today. Electromation is now on appeal to the Seventh Circuit Court.

Few cases have actually been brought to the NLRB on these issues. A recent study[36] found an average of about three such NLRB decisions a year over the last quarter century. This may change in the future, however, given the visibility and importance attached to the Electromation case. For these reasons, a number of employer representatives suggested the Commission recommend major revisions in this area of labor law. Most labor leaders believe no change in the law is required.

If changes to 8(a)(2) are to be considered, two related legal questions will need to be addressed. The first reflects the same arms-length adversarial philosophy of workplace representation embodied in Section 8(a)(2). This issue concerns exclusion of all supervisors and managers for the rights and protections of national labor law. This statutory exclusion rests on the assumption (see Bell Aerospace, (1974)) that employers need the undivided loyalty of management in representing shareholder interests where these conflict with the interests of the work force. If a more cooperative conception of the employer-employee relationship is embodied in labor law so that representation does not necessarily imply the existence of an adversarial relationship, it may be necessary to reconsider whether supervisors or middle managers should be denied the right to union representation or collective bargaining.

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[36] James Rundle, "The Debate Over Modifying the Bar on Employee Dominated Labor Organizations: What Is the Evidence?" Cornell University, unpublished manuscript, 1993.

The second question also involves the managerial exclusion doctrine in the NLRA and arises out of the Supreme Court's 1980 Yeshiva University decision. The Court found that university faculty were excluded from the NLRA because as a group they influenced their employer's policies about curriculum content, teaching staff, and so on. Up to this time, that brand of legal exclusion has been applied principally to university faculty and other professional-level employees. However, as noted earlier in this Chapter, even under current labor law more and more employers are choosing to delegate to work teams considerable autonomy to shape the make-up of their group, their mode of operations, materials and equipment used, and so on. It would seem inconsistent with the intent of the NLRA if, in pursuit of more innovative and cooperative work relationships, employees were denied the right to independent union representation.

8. Summary and Questions for Further Discussion

The Commission's findings with respect to employee participation and labor-management cooperation can be summarized as follows:

1. Employee participation, in a wide variety of forms, is growing and is partially diffused across the economy and the workforce, extending to upwards of one-fifth to one-third of the workforce. Adding the more informal styles of communication and involvement found in many small establishments would likely increase the number covered.

2. The trends in the workforce and the economy identified in Chapter I suggest interest will continue to grow in future years as the education of the workforce rises, technology creates more opportunities to share information and delegate decision-making authority, and the pressures of competition require continuous improvement in productivity and quality.

3. Survey data suggest that between 40 and 50 million workers would like to participate in decisions on their job but lack the opportunity to do so.[37]

4. Labor representatives view employee participation as a means to enhance both competitiveness and workplace democracy. They believe that independent representation is essential to achieve both of these goals. Most management representatives see employee participation as an integral part of the work process and believe

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[37] See footnote 33 for the calculations of these estimates.

effective participation can be achieved in both union and nonunion settings.

5. The labor and employment legislation enacted in the 1930s has raised questions about a variety of forms of contemporary employee participation. This is particularly true of (l) employment laws and regulations that try to draw a distinction between "exempt" and "nonexempt" employees or among "workers," "supervisors" and "managers," and (2) labor laws that may tend to limit the scope of employee participation in both nonunion and union settings.

6. Where employee participation is sustained over time and integrated with other organization policies and practices, the evidence suggests it generally improves economic performance. If more widely diffused and sustained over time, employee participation and labor management cooperation may contribute to the nation's competitiveness and standards of living.

7. Both historical and contemporary evidence suggests that employee participation and labor-management cooperation are fragile and are difficult to sustain and diffuse in the American environment.

8. The available evidence does not provide a clear understanding of the factors that limit the diffusion or sustainabilty of employee participation and labor-management cooperation. Four factors that appear to be important include: insufficient trust, the inability of employees to initiate participation, economic pressures on employers, and government policies and legal issues. Further understanding is needed, however, of these and other barriers and potential strategies for overcoming them.

These findings suggest a number of questions on which the Commission invites further discussion and analysis:

1. How can the level of trust and quality of the relationships among workers, labor leaders, managers, and other groups in society and at the workplace be enhanced?

2. Is there a deep unrealized interest in participation in the American workforce? If so, what keeps these employees from taking the initiative on these matters?

3. Should employees have some voice in initiating employee participation? If so, how might this be done?

4. Should employees have some voice in determining whether, once started, a given employee participation process should be continued, changed, or terminated? If so, how might this be done?

5. How serious are the economic obstacles such as downsizing pressures for short-term results, high start-up costs, and lack of understanding in the investment community? What, if anything, can be done to address these issues?

6. How should the legal uncertainties and limits on employee participation and labor-management cooperation be addressed without discouraging workplace innovations that enhance the competitiveness of the modern workplace and without risking a return to the conditions that motivated passage of these protections?

7. What, if any government strategies can assist the diffusion of employee participation and labor-management cooperation?

The issues raised in this chapter should not been seen in isolation. They are tightly interrelated with the issues discussed with respect to collective bargaining in Chapter III and government regulations and dispute resolution in Chapter IV.

With respect to future legal policy, the major question is whether, and if so, how, the National Labor Relations Act should be revised or interpreted to permit nonunion firms to develop one or more of the array of employee participation plans that have been challenged under Section 8(a)(2) of the Act:

- Self-managed production teams, particularly if the team addresses not only efficiency and product quality, but also workplace safety, assignments, and other matters of direct concern to employees.

- In-house dispute resolution procedures in which employees may participate either as members of the committee hearing the matter or as representatives of the employee with a grievance.

- Joint quality of working life committees in some of which employee-members are selected by management, and in others by the employees.

- With respect to these and other forms of employee participation that have become more common in the modern workplace, very different policy positions are now being advocated from different quarters:

- Section 8(a)(2) should be retained in its present form.

- Section 8(a)(2) should no longer limit the freedom of nonunion employers to establish procedures by which its employees will "deal with" (as opposed to "collectively bargain" about) conditions of employment.

- Section 8(a)(2) should be relaxed to permit employers to establish such employee participation procedures dealing with conditions of work, if these procedures meet certain standards about employee selection, access to information, protection against reprisals, and the like.

- Section 8(a)(2) should be altered to require employers to offer their employees participation procedures meeting these minimum quality standards.

In the second stage of its proceedings, the Commission would like to hear from interested parties about which of these (or other) options are preferable (and what, if any, revisions might also be made in the scope of the managerial exclusion from the NLRA).

Exhibit II-4
Two Cases of Partnerships in Union Settings

I. Ford-UAW

The Ford and UAW joint initiatives are national and local. At both levels, they address matters of common concern in areas such as product quality, education and development, employee involvement, team structures, work redesign, health and safety, ergonomics, employee assistance, apprenticeship, and labor-management studies.

Job security protection, wide information sharing, and profit sharing are all important building blocks for this structure of workplace cooperation.

A negotiated central fund and local training funds, projected to total $75 million in 1993, support these joint endeavors. Administrative direction is furnished by the first National Training Center ever negotiated in the United States, plus a network of national and local committees that extends to all 71 Ford-UAW locations in the U.S.

Each workplace program has a purpose, structure, and focus of its own. Some have large programs within programs. For example, there are more than 20 individual programs in education and development.

Source: 1993 UAW-Ford Joint Programs Key Documents.

II. Joint Approach to New Plant Design at Miller Brewing Company

In October 1990 the decision was made to open Miller Brewing Company's plant located in Trenton, Ohio. Planning at the earliest stages assumed that our workforce at the new facility would be unionized. The planning team decided that if the workforce chose to be represented, a significant investment would be made in communicating with the union leadership about issues facing the plant, the company, and the industry.

While certain decision-making responsibility would still reside with management, union involvement in plan operational planning, problem-solving, and goal setting would be sought at every level and few decisions would be made without the union leadership's consent and endorsement. In practice, this meant that the plant's management team would not only have to include the union in weekly staff meetings, decisions, and planning, but would also have to re-think which decisions required staff-level attention and involvement.

Exhibit II-5
Two Cases of Plans in Nonunion Companies

I. Donnelly Corporation

[The Scanlon Plan] was introduced in 1952...in the late 1960s Donnelly had worked with the Scanlon Plan for a fair amount of time but we really introduced what we call the "Team Concept" in the late 1960s....We also started at that time trying to provide an alternate forum for due process...the Equity Structure began in the late 1960s as basically an employees' committee....Now it's developed over time to a representative structure to make sure that it satisfied two fundamental purposes. These representatives sit on committees, and we have sort of a hierarchy of committees. Eventually, the top committee in this structure is the Donnelly committee, which has 15 voting members, one of whom is the president of the company. So again, it is a diagonal slice; there are representatives from all different section of the company.

This structure has two fundamental purposes....it provides a safety net on issues of fairness, the whole issue of due process, grievance processing. We also call it the issue resolution process, so I think that's a very interesting commonality there.

Also, we ask our equity structure to guarantee that people have a voice in the development ent of policies that affect them and in fact, we ask our Donnelly committee to unanimously agree on all personnel policies that we put into place in the company.

II. Herman Miller, Inc.

We began to practice participative management in the 1950s with the adoption of our Scanlon Plan...Every month we hold informational meetings to inform all employees of business conditions and our performance to plan. Every full-time tenured employee, regular employee, with one year of tenure, is given stock in the company throughout profit sharing plan.

[W]ithin our organization we have an internal Appeals Board, which is made up of management and employees. There is a group of ten people who an employee an choose [five] from and appeal a decision to them.

We also have what we call caucuses and councils. Caucuses are used for information sharing, for seeking charity, for groups, and they elect an individual who is able to act as an information source for that group of employees in the organization.

We have what we call a Suggestion Review Board, which is made up of representatives from all disciplines in the organization, and it is a diagonal representation of employment.

Exhibit II-6

The Polaroid Problem

I. The Employee's Complaint

I was elected to the Employee' Committee in 1992...I ran on a platform of reform. The word around the company was that the Employees Committee was a tool of management and did not represent the employees and had been that way for a long, long time.

So I filed a complaint with the Office of Labor Management Standards...They did an investigation and found out, yes, that...these officials of the union should be elected by the membership.

There was a special meeting of the Employees' Committee....shortly thereafter where Mr. Booth appeared along with other corporate executives, and said he had decided to do away with the Employees' Committee...

It was widely known in the company that this organization was not in compliance with the law, but nobody filed a complaint about it. But, they [employees] wanted reform. We all wanted reform. They said it didn't represent us. I was there trying to do what I felt I had been elected to do. That was to make this body of people represent the employees of this company. That was what they had elected to do. Then, all of a sudden, it was gone.

II. The Company's Dilemma

What it needed for sure is greater freedom to try new ideas and methods of participation without the fear, that merely discussing vital workplace questions with employees, means being charged with unfair labor practice violation. It seems terribly unreasonable for federal policy to urge workplace cooperation and then put out of bounds open discussion on the most vital issues for employees--pay, policy, and benefits.

As a practical matter, I can't figure out how to engage in any meaningful discussion about any workplace issues without treading on those important matters. Employee involvement is about new creative ideas and solutions. That is what our country's history has been all about. So why have barriers to trying out different forms of employee creativity in the workplace to solve mattes are so important to eveyone?

Exhibit II-7

Works Councils in Europe

1. Councils are elected by and cover all employees (up to the most senior executives) in an establishment. Works councils have information sharing rights on issues affecting the enterprise and consultation rights on a wide array of human resource policy issues. In Germany work councils have joint decision-making rights on some specific workplace issues.

2. Works councils operate separately from unions though in most countries unions representatives make up the majority of council members and unions sometimes provide technical advice and other supports to council members. Works councils are reported to be more effective where there is a strong union presence and support for council activities. They are least effective in France where they lack support from either employers or the ideologically divided French unions.

3. In some countries unions and/or employers initially oppose works council legislation. In countries with legislation works councils are now generally accepted by both unions and employers with France again serving as the exception to this generalization. British employers generally oppose works council legislation both within their country and through directives of the European Commission.

4. Works councils encourage employers to consider and consult on human resource issues when planning major restructuring or modernization decisions and encourage employees to recognize the need for such plans. Some see this as a major benefit; it elevates the importance and integrates human resource policies with other strategic decisions. In addition, councils tend to: (a) improve communications and assist in resolving grievances, (b) delay decisions but improve their quality; (c) provide flexibility in adapting regulations to fit the needs of different worksites, and; (d) support diffusion of work redesign and decentralized decision making.*

5. But these benefits are not costless. Councils slow decision-making. Some see them as to formal and less flexible than the informal small group problem solving processes found in American firms, especially when faced with the need for major restructuring often called for by current competitive conditions.

Chapter III

Worker Representation and Collective Bargaining

Introduction

Since enactment of the National Labor Relations ("Wagner") Act in 1935, the declared policy of the United States has been "to encourage the practice and procedure of collective bargaining." Congress asserted that collective bargaining is an essential instrument for securing "equality of bargaining power between employers and employees," and promoting economic and political democracy for American workers. Public opinion surveys have long made it clear that most Americans approve of unions in general and of the right of employees to join the union of their choice.[1] In presentations to the Commission, representatives of labor and business concurred with the basic principle of the Act that workers should have "full freedom of association, self organization, and designation of representatives of their own choosing."

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[1] A 1988 Gallup poll found that 69 percent of Americans believe that "labor unions are good for the nation as a whole." A 1991 Fingerhut/Powers survey reported 60 percent of the general public agreeing (and 23 percent disagreeing) that "unions have basically been good for American working people." A 1992 Harris Poll showed that general approval of unions does not necessarily translate into support of their stand on particular issues, such as on NAFTA.

The intent of the Wagner Act was to encourage collective bargaining, not to mandate it in any particular workplace. The Wagner Act made it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of their right ... to form, join, or assist labor organizations." The 1947 Taft-Hartley amendments to the NLRA made it an unfair labor practice for labor unions to coerce employees who wanted "to refrain from" union representation.

By making it illegal for either management or unions to coerce employees in their freedom of association, the Nation's labor law seeks to leave the decision whether to form a union or not in the hands of workers.

The second charge to the Commission provides:

> "What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?"

In most workplaces with collective bargaining, the system of labor-management negotiations works well. Conflict is relatively low, and unions and firms have developed diverse forms of new cooperative arrangements, as Chapter II indicated. The relations among workers, their unions, and management in these workplaces are well-regarded by these parties. In testimony before the Commission, the leaders of major companies and unions attested to their positive experiences with collective bargaining.

Peter J. Pestillo, Executive Vice-President Corporate Relations, Ford Motor Company testified as follows:

> "In this constantly evolving environment of uncertainty, can collective bargaining produce and sustain the type of cooperation the nation requires? I believe it can.
>
> Based on the Ford experience, I believe that management, unions and employees can successfully work together to improve relationships and improve U.S. competitiveness on a firm-by-firm basis. It's a tall order. But it's the only way to proceed if we want to be here for the long run.
>
> We can't afford a collective bargaining meltdown." (July 28, 1993).

Moreover, in some cases, parties develop their own non-conflictual procedures for determining workers' preference for unionism. The Commission heard testimony about some of these efforts to reduce the degree of conflict and resources devoted to confrontational battles over whether new facilities should be organized. Philip Morris, Miller Brewing, and the General Motors' Saturn Division created joint task forces to discuss the organization of work and the management system in their new facilities. In each case this produced union representation without prolonged conflict so that collective bargaining could start in the new facilities on a cooperative basis. Other firms, such as AT&T and Scott Paper, have negotiated rules of conduct to govern union organizing in new facilities or business units.

For instance, AT&T agreed that it would not campaign against organization and that it would recognize the union if a majority of employees signed cards indicating that they desire representation. (This agreement excludes that part of AT&T that was formerly National Cash Register). According to testimony before the Commission, this system has worked well. The Commission notes that in some of these facilities workers have chosen to remain nonunion.

In addition to these cases, other parties have developed their own procedures for voluntary representation elections. Many companies maintain nonunion facilities and good relations with workers and unions without engaging in a "war" over organizing new plants or worksites.

Where much conflict and delay does occur is in the process of providing workers a democratic choice whether to organize a union in previously unorganized workplaces. The history of union organization is not one of a "laboratory condition" election (to use the phrase that has guided the National Labor Relations Board) of employees for or against forming a union to bargain collectively with their employer. Many firms and business organizations in the United States have historically been more resistant to the formation of unions than managements in other advanced economies, and often have sought to discourage unionization. Employees and union organizers who seek to bargain collectively have countered this resistance with their own variety of tactics, with varying degrees of success over time.

General agreement exists on broad principles regarding worker representation and collective bargaining; however, the effort to implement those principles in workplaces encounters a highly conflicted and emotional debate. Since the 1926 Railway Labor Act every major piece of legislation regulating the process of organizing a union has been the subject of bitter partisan political and union-management conflict. Most union organizing drives in the United States today are difficult for both employees and management. Though the number of union organizing campaigns is small compared to the universe of workplaces, the perceptions generated by these conflict-driven situations pervade the broader employee and management relationships.

The first step in moving toward a dispassionate and reasoned discourse on the experiences with worker representation and collective bargaining under U.S. law is to examine statistical evidence on the operation of the National Labor Relations Act.[2] Much of the data in this chapter comes from the statistics of the National Labor Relations Board (NLRB), and the record was developed under both Republican and Democratic administrations over the years.

The Process of Establishing Collective Bargaining

Before examining statistical trends, however, it is useful to set out the key features of the National Labor Relations Act that guide the model for determining whether there is to be a collective bargaining relationship at any given workplace.

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[2] From the outset, the National Labor Relations Act contained the provision: "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation or for economic analysis." The paucity of analysis and data, other than operating statistics, hampers efforts to study and appraise the work of the NLRB and the public policies it administers.

1. The majority verdict of employees in an appropriate unit determines whether or not they will be represented by a union for purposes of collective bargaining -- a decision typically made through a secret ballot election conducted by the National Labor Relations Board at the employees' worksite.

2. Prior to this election, the employer and the union are entitled to, and usually do, engage in a vigorous campaign pointing out the pros and cons of changing the nonunion status quo. However, as noted above, both sides are prohibited from threatening or inflicting retaliation against employees who support the other side -- in particular, employers through dismissals of union supporters or of labor organizations through coercing employees in their decision respecting self-organization.

3. If the majority of employees vote for union representation, the employer must recognize the designated union as exclusive bargaining agent for employees in the unit, and must engage in good faith negotiations about terms and conditions of employment that would be incorporated in a collective agreement; but the employer is not required to make concessions to particular union proposals.

4. If agreement cannot be reached voluntarily by the two sides, employees have the legal right to collectively withdraw their labor (i.e., to strike) without fear of dismissal; although the employer is free to lockout workers or to permanently replace striking employees in their jobs.

Not all workers are covered by the National Labor Relations Act. Some, such as managers, supervisors, agricultural workers, and domestic workers, are excluded by the law. Workers in the railroad and airline industries are covered by the Railway Labor Act.

Other workers nominally covered by the law are effectively excluded, because they may be part-time or contingent, as described in Chapter I, or because they may have an independent contractor relationship with a sole employer. These temporary, "leased," on-call, or self-employed contractor status workers, are often low-paid individuals.

Finally, the situation of employers and workers in construction differs enough from that of other employers and workers to merit special attention. We examine first the experience of employees for whom the procedure given above applies, and whose experience dominates the NLRB statistics.

Part A

Experience Under the National Labor Relations Act

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1. NLRB Certification Elections

Since passage of the NLRA almost 60 years ago, millions of workers and large numbers of unions and enterprises have used the procedures established by the NLRB. The majority of participants have compiled with the established requirements without resort to tactics that were challenged by either side and later found illegal by the Board.

Exhibit III-1 (see page 81) shows the number of elections held for union certification under the NLRB and the outcome of this stage of the process to form a collective bargaining relationship. It gives the data in five year annual averages from 1950 to 1980 and in single years thereafter.

The first fact that stands out is that the number of certification elections and workers involved has been small compared to the number of workplaces and employees in the United States.

- In the late 1980s, less than 4,000 NLRB elections were held in any given year. This contrasts with the large number of establishments in the U.S. shown in Chapter I. The number of "eligible voters" in NLRB elections has ranged from roughly 200,000 to 250,000 in the 1980s. This contrasts with the approximately 65 million non-union employees[3] potentially covered by the Act.

- The extent of NLRB election activity has trended downward through much of the post-World War II period. In the early 1950s for example, the Board conducted nearly 6,000 elections, involving over 700,000 workers. By the late 1970s, the total number of certification elections had risen to over 7,500, but in smaller-sized units totaling 490,000 employees. From 1975 to 1990 the number of elections fell by 55 percent to 3,628 elections involving 230,000 workers.

- Fewer workers were involved in the NLRB representation process in 1990 than were involved in previous decades, despite the enlarged work force.

One important implication of these statistics is that the NLRB data on organizing campaigns, and on unfair labor practices by management and labor in these campaigns, reflects experiences in a small portion of the American labor market. Even at 1960s or 1970s levels of NLRB election activity, only a relatively small number of workers and workplaces were involved in representation campaigns that reached the election stage.

A second fact is that the success of employees in organizing unions through the NLRB election process has fallen sharply.

- The proportion of elections in which workers voted to unionize fell from the early 1950s levels of 1950 to 1954 of 72 percent to figures hovering about 50 percent in the 1975 to 1990 period.

- The number of workers eligible to vote in NLRB elections has fallen more than has the number of elections. This reflects the fact that union organizing drives have increasingly been located at smaller workplaces.

- The number of employees in newly certified units shows a greater percentage decline than does the number of newly certified units. This is because unions have been less successful in winning elections in larger workplaces in the 1970s and 1980s than in the 1950s and 1960s. In 1990, 79,000 workers were in newly certified units.

The number of NLRB elections held, the number of workers in elections, and the number in units certified for collective bargaining has diminished.

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[3] The estimate of 65 million is based on applying 74 percent to the 88.1 million total private sector wage and salary workers reported in U.S. Department of Labor Employment and Earnings January 1994, Table A-23. The estimate of 74 percent is based on data in Table 1 of Dorothy Sue Cobbie's "Making Post-industrial Unionism Possible" Rutgers University, January 7, 1994 .

The number of workers organized through NLRB elections, and the downward trend in such, underlies the decline in the proportion of the private sector workforce whose conditions of employment are shaped by collective bargaining described in Chapter I.

The process of moving from a petition for an election to an election involves several steps. The union seeking to represent the workers first goes to the NLRB with a written authorization petition from at least 30 percent of workers in the relevant unit, but which usually includes close to two-thirds of the workers. Once the Board has directed an election, it also provides the union with a list of names and addresses of employees in the election unit.

The union can speak to the employees on its own premises or in the employees' homes, if the employees are willing. The employer can speak to the employees at the workplace, whether through one-on-one conversations between supervisors and workers, or in general meetings which employees are required to attend and from which individual workers who support unionization may be excluded. Union organizers are excluded from these meetings and are typically banned from speaking to workers in some places accessible to the general public, such as company parking lots, or cafeterias. Supervisors who refuse to engage in the company's campaign may be legally discharged. Studies show that consultants are involved in approximately 70 percent of organizing campaigns and that unions are less successful in those campaigns than in others. There are no accurate statistics on consultant activity.

How long does an NLRB election campaign last? Exhibit III-2 (see page 82) shows the time between union petitions for an election and the actual election. The median time from petitioning for an election to a vote has been roughly fifty days for the last two decades (down considerably from the time taken in the 1940s and 1950s).

The union determines when to file an authorization petition, and employers can influence the election date by raising issues about the relevant election unit and insisting on a pre-election hearing and decision about them. Employers and unions can also agree on the definition of the unit or exclusion of certain categories of employees from its scope, producing consent or stipulated elections that will take place more quickly.

It is difficult to determine the effect of the time between a petition and an election on whether workers vote for or against unionization. Unions are more likely to win elections held relatively quickly, but this does not prove that time in fact affects the election result. Many things will differ between elections that take place quickly and those that take a long time. Management is more likely to be resistant to the organizing drive in the latter case. Approximately 20 percent of elections take more than 60 days.

Compliance with the NLRA

The NLRA makes provision for identifying and remedying unfair labor practices involving any participant.

The NLRB statistics provide information about management and union illegal behavior under the labor law.

Exhibit III-3 (see page 83) records the number of unfair labor practice charges against employers, the percentage held meritorious, the decomposition of the charges between those under Section 8(a)(3) (which prohibits discriminatory discharges and other retaliatory actions against union supporters) and those under Section 8(a)(5) (which prohibits employers from bad faith bargaining in a collective bargaining situation). The last three columns give the number of backpay awards, amount of awards, and the number of employees ordered reinstated due to employer unfair practices. The Exhibit gives figures as annual averages in five year intervals through 1980 and for single years thereafter.

- Through 1980, there was an upward trend in unfair practice charges against employers. In the early 1950s, when the number of certification elections was running at roughly 6,000, approximately 3,000 8(a)(3) charges were filed each year against employers, and a little over 1,000 8(a)(5) charges were also filed. By the late 1970s, with approximately 7,500 NLRB elections per year, Section 8(a)(3) charges had risen five-fold, to almost 16,000 a year, while Section 8(a)(5) charges were up to nearly 7,500 annually.

- From 1980 to 1990, the number of Section 8(a)(3) charges against employers fell by 50 percent while the number of Section 8(a)(5) charges against employers remained stable. The fall in Section 8(a)(3) charges tracks the fall in NLRB elections over the period.

- More than 60 percent of unfair labor practice charges are either withdrawn by the complainant or judged to be without merit by the National Labor Relations Board. This means that the number of charges under the law exaggerates the extent of violations. In 1990, there were about 10,600 charges of unfair labor practices against management that were found meritorious by the NLRB.

- The proportion of charges found meritorious has trended upward over time. In 1990 44 percent of charges against employers were held meritorious compared to less than 40 percent in the 1950 to 1975 period.

- The number and amount of backpay awards given to employees and the number of employees reinstated under the Act because of meritorious charges against employers rose from about 1960 through the mid 1980s. The number of backpay awards roughly stabilized thereafter, in the 17,000-18,000 range, while the amount of backpay awarded continued to grow. The number of employees ordered reinstated dropped from the early 1980s to around 4,000-4,500 in the late 1980s and 1990.

Taken by themselves, the statistics in Exhibit III-3 may overstate the degree of employer interference with employee free choice about union representation. Because the legal reach of Sections 8(a)(3) and 8(a)(5) has been considerably expanded by the Board and the courts over time, many meritorious complaints do not take place within the context of representation campaign or attempted negotiation of a first contract.

The NLRB does not separately catalogue meritorious 8(a)(3) complaints that are precipitated by a representation contest. However, the Commission used a methodology developed by University of Chicago Professors Bernard Meltzer and Robert Lalonde[4] to calculate the share of reported NLRB reinstatements that were connected to union organizing campaigns.

Exhibit III-4 (see page 84) presents one set of estimates of the number of workers offered reinstatement arising from NLRB certification elections, the ratio of those workers to workers voting for unions, and the percentage of elections producing reinstatement offers.[5]

- In the early 1950s, approximately 600 workers were reinstated each year because of a discriminatory discharge during a certification campaign. By the late 1980s, this number was near 2,000 a year.

- Adjusted for the number of certification elections and union voters, the incidence of illegal firing increased from one in every 20 elections adversely affecting one in 700 union supporters to one in every four elections victimizing 1 in 50 union supporters.

The number of reinstatement offers arising from certification elections, while small and relatively constant since 1975, has risen significantly when compared to the total number of workers voting for unions.

As noted earlier, section 8(b)(1)of the NLRA makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their rights of self-organization guaranteed by law.

Exhibit III-5 (see page 86) shows the number of unfair labor practice charges against unions, using a format similar to that in Exhibit III-3 for charges against employers.[6]

- In 1990, nearly 9,700 unfair labor practice charges were filed against unions, constituting 29 percent of the nearly 34,000 unfair labor practice charges filed with the Board. The proportion of charges held meritorious was just over a quarter, so that charges against unions represented 17 percent of the charges found meritorious, 10 percent of complaints issued, and 11 percent of cases in which formal decisions were made by the Board that year.

- The trend in unfair labor practice charges against unions, like that

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[4] See Robert LaLonde and Bernard Meltzer, "Hard Times for Unions: Another Look at the Significance of Employer Illegalities," 58 University of Chicago Law Review 953, 1991.

[5] The estimates are imperfect as a measure of discriminatory discharges during elections. One problem is that they only include workers offered reinstatement and exclude those offered backpay. Another problem is that some of the reinstatement offers may occur in situations in which the union petitions for an election but does not proceed to an election. There is no reason to expect these problems to bias the trends over time shown in the Exhibit. Though not taking issue with the Meltzer-Lalonde methodology and findings regarding the rate of illegal discharges during organizing campaigns, former NLRB Chairman Edward Miller pointed out to the Commission that unions actually file objections to employer conduct in only six percent of elections, and these objections are found meritorious in only two percent of the cases.

[6] The NLRB does not have available statistics that show the number of unfair labor practice charges against unions in certification elections, so Exhibit III-4 cannot be replicated for unions. However, the NLRB tends to set aside an election, and orders a new election, on a finding that a union has coerced employees in their free choice.

against firms, is upward from 1950 through 1980, and falls in the 1980s coincident with the falling number of NLRB representation elections.

- The percentage of unfair labor practice charges held meritorious against unions was below 30 percent in the 1980s and trended downward since roughly 1970.

Unfair labor practices against unions grew until the 1980s. The proportion of charges against unions held meritorious is lower than the proportion held meritorious against employers.

Comparing the statistics in Exhibits III-3 and III-5 shows that a larger proportion of unfair labor charges and of charges held meritorious are against employers than are against unions. In 1990, 71 percent of unfair labor practice charges (Section 8(a) and 8(b)) were against employers and 81 percent of charges held meritorious were against employers.

2. Unfair Labor Practice Sanctions

What penalties does the law impose on employers or unions who engage in unfair labor practices?

The philosophy of the NLRA has been to repair the harm done to injured employees by providing employees who were fired for union activity with backpay and by ordering them reinstated in their jobs.

The monetary penalty for an employer firing a union supporter in violation of Section 8(a)(3) is the back pay that was lost by the employee-victim, minus any sums the employee did (or should have) earned in another job while awaiting relief from the NLRB. In 1990, the average back pay award amounted to $2749 per discharge.

The "in kind" relief of reinstating workers who were illegally fired often takes a long time to effectuate. Before an employer is legally obligated to reinstate a discharged employee, the case goes through a four-stage procedure. The employee's charge must first be judged meritorious by the Board's regional office, then by an Administrative Law Judge following a full-scale trial, then by the Board itself, and then by a federal appeals court -- a process that takes an average of three years to complete. In practice, however, most such cases are resolved long before they reach the end of this legal path.[7] Earlier disposition of a charge requires voluntary agreement between the parties.

Empirical research shows that most illegally fired workers do not take advantage

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[7] As former NLRB Chair Edward Miller pointed out to the Commission, the source of delay is not at the Board's initial investigative stage. The Regional Offices screen out or settle the bulk of charges and issue formal complaints in meritorious cases within 45 days or so, a track record that just about any other labor or employment agency would be proud to have. The crucial delay occurs at the next stage, the administrative law judge proceedings, which typically takes a year to complete, and then only with a recommended disposition to the Board itself. Rather than superimpose on this administrative process the additional avenue of interim injunction sought from judges, Miller would rather move the trial of all NLRA unfair labor practice cases into a specialized federal labor court which had full judicial authority to move as quickly and effectively as the legal circumstances required. (See Edward B. Miller, An Administrative Appraisal of the NLRB (Rev. ed. 1980).)

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of their right to reinstatement on the job, following an order, and most reinstatees are gone within a year.[8]

Employers who violate Section 8(a)(5) by engaging in surface bargaining typically are ordered by the NLRB not to repeat this conduct in the future. The Board cannot award any specific contract term that employees may have been denied by reason of their employer's bad faith bargaining. Most NLRB orders directing employers to cease bargaining in bad faith do not lead to a first contract, and of those that do, most do not see a contract renewal.[9]

Board remedies against employer unfair labor practices can be compared to the remedies available to employers against the unfair labor practice of unions, the secondary boycott, that was outlawed by the 1947 Taft-Hartley amendments to the NLRA. Section 8(b)(4) of the Act makes it an unfair labor practice for unions to engage in any such secondary pressures, either for "top down" organizing of nonunion employees, or where employees on strike in a bargaining dispute with their own employer have asked fellow union members working for other employers not to handle goods and services produced by their strike replacements.

Both the secondary and the primary employers affected by such union actions have the right under Section 10(l) of the NLRA to have the Board's regional office seek immediate injunctive relief (typically within a few days) from a federal district judge: as well as the right under Section 303 of the Labor Management Relations Act to sue the union in court for all damages sustained as a result of its illegal behavior (including recovery of the employer's legal costs of suing the union). Those statutory sanctions have greatly reduced the use of secondary boycotts.

Congress did not, however, enact the same enforcement provisions for cases in which employers illegally discharge union supporters in an organizing campaign or engage in bad faith bargaining with newly-elected union representatives as they do for secondary boycotts. The Taft-Hartley law (Section 10(j)) empowers the Board itself (not its Regional Office), following issuance of an unfair labor practice complaint, to petition a federal district court for interim injunctive relief.[10] In practice, this legal avenue is pursued infrequently each year, and is usually too late in discriminatory discharge cases to undo the damage done.

More recent employment law including the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and related antidiscrimination laws that Chapter IV examines, and the tort of wrongful dismissal,[11] use a very different enforcement model. Over and above the back pay lost by the fired employee, the employer is liable for consequential financial and psychological harm to its victims, punitive damages for willful misconduct, and the attorney fees of victorious plaintiffs.

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[8] The first study, by Les Aspin of reinstatement cases in New England in the early 1960s, is summarized in Hearing on H.R. 11725 before the Special Subcommittee on Labor of the Committee on Education and Labor, 90th Congress, 1st Sess. 3-12 , 1967. The second study, by Elvis C. Stephens and Warren Chaney of cases in Texas in the early 1970s, is reported in "A Study of the Reinstatement Remedy under the NLRA," 25 Labor Law Journal 31, 1974, and "The Reinstatement Remedy Revisited," 32 Labor Law Journal 357, 1981.

[9] Philip Ross, The Labor Law in Action: An Analysis of the Administrative Process Under the Taft-Hartley Act, An Independent Study Supported by the NLRB, Typescript, 1966; Benjamin Wolkinson, "The Remedial Efficacy of NLRB Remedies in Joy Silk Cases ," Cornell Law Review 1, 1969.

[10] The Board may delegate this authority to its Regional Office.

The NLRA mode of dealing with employers or unions who violate the rights of workers under the Act is remedial or reparative. There are stiffer sanctions available to employees whose rights are violated under most federal and state employment laws.

3. The Trend in First Contracts

NLRB certification that employees voted to be represented by a union is one step in establishing collective bargaining in the workplace. The next step is for employees and their union to secure a written agreement from the employer.

Data about the historical trend in success in negotiating first contracts is less firm than the data on certification elections. One set of estimates is from independent analysts who have used various samples in different years to determine the extent to which workers who elect a union to represent them in collective bargaining obtain a contract. The earliest estimate in the late 1950s found that unions failed to secure a first contract 14 percent of the time,[12] whereas estimates of the union failure rate in the 1980s are on the order of 20 to 37 percent.[13]

The Commission received new information on first contracts from the files of the Federal Mediation Conciliation Service (FMCS). Since fiscal year 1986 the FMCS, by informal arrangement with the NLRB, has received notice and copies of all new certifications. Exhibit III-6 (see page 87) presents these new data.

- Of the 10,783 certification notices the FMCS received between 1986 and 1993, initial agreements were reached in 6,009 or 56 percent of those units. Another 4 percent were found not to need mediation or to fall outside the FMCS jurisdiction. Thus, on the order of two-thirds of certification elections lead to a first contract, whereas one-third or so do not.

- Because many newly certified units do not produce a first contract, the number of workplaces which obtain a collective bargaining contract through the NLRB process is lower than indicated in the election figures in Exhibit III-1. Applying two-thirds to the percent won figures in that Exhibit indicates that just one-third of NLRB elections resulted in a collective bargaining contract in 1990, and that on the order of 53,000 workers ended up with a contract.[14]

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[11] See Clyde Summers, "Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals," 141 University of Pennsylvania Law Review 457, 1992.

[12] Philip Ross, The Labor Law in Action: An Analysis of the Administrative Process Under the Taft-Hartley Act 12, An Independent Study Supported by the NLRB, Typescript, 1966. Also see, Philip Ross, The Government as a Source of Power. The Rule of Public Policy in Collective Bargaining. Brown University Press, 1965, Theodore J. St. Antoine, "The Role of Law" in U.S. Industrial Relations 1950-1980: A Critical Assessment, Industrial Relations Research Association, 1981, pp. 172-77.

[13] An analysis done for the AFL-CIO's Industrial Union Department, Gordon Pavy, "Winning NLRB Elections and Establishing Stable Collective Bargaining Relationships With Employers," found that of NLRB certifications secured by AFL-CIO affiliates in 1987, the union had by 1992 negotiated a first contract for 65 percent of the units and a second contract in just 47 percent (covering 59 percent of the employees).

- FMCS data also show that strikes occurred in 356 of these first contract negotiations. First contract strikes tended to last longer than contract renewal strikes handled by FMCS -- an average of 45 days versus 30 days -- and to produce fewer agreements at the end of the strike -- 54 percent versus 82 percent.

Studies of representative samples of first contract situations[15] indicate that roughly a third of employers engage in bad faith "surface" bargaining with the newly-elected union representative, and that this illegal tactic significantly reduces the odds that employees will secure an initial agreement from their employer (or if they do, that the bargaining relationship will survive the next round of negotiations).

The Commission is aware that many factors can contribute to the failure of the parties to reach agreement including bad faith bargaining.

4. Cost of the NLRB Election Process

There do not exist national data on the amount of resources spent by management and labor in fighting NLRB election campaigns, but most participants and observers assess the dollar and human cost as high in relation to the extent of such activity. Firms spend considerable internal resources and often hire management consulting firms to defeat unions in organizing campaigns at a sizable cost. Unions have increased the resources going to organizing and spend considerable money in organizing campaigns. Employees who want representation devote considerable time and effort to this activity.

In testimony before the Commission both union and employer spokespersons stressed the confrontational nature of the election process. (See Exhibit III-7, page 88)

Ms. Allison Porter of the AFL-CIO Organizing Institute explained the problem faced by union organizers who must tell workers the risk they face from illegal firings. Mr. Clifford Ehrlich of Marriott International explained how employers view "perpetual conflict" in organizing drives. Public opinion polls show that many Americans recognize the problems involved in organizing drives as well.

In a 1988 Gallup Poll, 73 percent said that "workers' rights and abilities to organize unions have faced a strong challenge from corporations in the past few years," 69 percent stated that "corporations sometimes harass and fire employees who support unions," and 44 percent reported that "if employees attempted to form a union in my workplace, serious conflict among employees would be inevitable."

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[14] Because the FMCS data do not give us the number of employees covered in different situations, we apply the distribution of new certificates to the number of workers in elections won.

[15] William N. Cooke, "Failure to Negotiate First Contracts," 38 Industrial and Labor Relations Review 163, 1985.

In a 1991 Fingerhut-Powers poll, 59 percent said it was likely they would lose favor with their employer if they supported an organizing drive; 79 percent agreed (versus 16 percent who disagreed) that it was either "very" or "somewhat" likely "that nonunion workers will get fired if they try to organize a union."[16] Of employed nonunion respondents, 41 percent believed (versus 50 percent who did not) that "it is likely that I will lose my job if I tried to form a union."

While no survey has documented the disturbance that a "war" for unionization brings to the employer nor the effects on productivity or profitability, the statement by Clifford Ehrlich makes it clear that the confrontational process brings tension and pain to employers as well as to workers.

The United States is the only major democratic country in which the choice of whether or not workers are to be represented by a union is subject to such a confrontational process in most cases. One reason for this is that the exclusive representation doctrine in the United States means that workers who want union representation must constitute a majority of the relevant work force: unionization is an all-or-nothing choice. Another reason is that in the United States unionization often raises the labor costs at a worksite, whereas in many other countries, collective bargaining or administrative decrees establish wages for all workers in a given sector regardless of unionization at the local site, while many benefits are nationally mandated. A third reason is that the legal framework poses the issue of worker representation as a campaign struggle between employers and unions.

The issue of union representation sparks a highly contested campaign between employers and unions that produces considerable tension at the workplace.

Summary

The four major findings that emerge from the NLRB and related evidence on representation elections, unfair labor practices, and first contracts are:

1. Relatively few new collective bargaining agreements have been created in recent years under the procedures of the NLRB.

2. The rights of most workers who seek to unionize are respected by employers, but some employers do violate the rights of some workers.

3. Employer unfair labor practices have risen relative to the declining amount of NLRB representation activity.

4. The NLRA process of representation elections is often highly confrontational with conflictual activity for workers, unions and firms that thereby colors labor-management relations.

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[16] The polling data referred to in this section are detailed in Richard Freeman and Joel Rogers, "Who Speaks for Us? Employee Representation in a Nonunion Labor Market," from Bruce E. Kaufman and Morris M. Kleiner, eds. Employee Representation: Alternatives and Future Directions 13, 2834, 1993.

5. The Human Face of the Confrontational Representation Process

Behind the NLRB and other statistics are real people -- American employees -- rather than spokespersons for organized labor or business groups. A number of employees testified before working parties of the Commission about experiences with employer reprisals in organizing campaigns.[17] These examples are not necessarily representative of organizing campaigns generally, and do not reflect on the behavior of employers at millions of worksites in the U.S. any more than the examples of criminal activity by some union leaders that sparked the Landrum-Griffin Bill of 1959 reflected on the overwhelming majority of union members and leaders. Still, the testimony "of workers trapped ... in the dark ages of labor-management antagonism" show that there is a negative side to American labor relations that reflects the highly charged nature of the debate and contrasts sharply with the efforts of employers and their workers to establish cooperative and productive relations documented in Chapter II of this Report. (See Exhibit III-8, page 89)

As the Commission has neither the investigative staff nor subpoena power to examine these examples in detail, the Commission simply reports the testimony before it, as in Chapter II.

6. Debate on Labor Law and Union Organizing Campaigns

The debate over labor law and union organizing goes beyond concerns over illegal conduct.

The Commission heard from labor leaders, front-line union organizers, and workers, and some scholarly experts that, as currently operated, the design and administration of the NLRA are ill-suited to providing workers a free choice about union representation.

The Commission also heard from many business representatives who believe the current law is working well, at least for the vast bulk of employers and workers, and does not need any major revision. The business representatives agreed that the Act should be effectively enforced; some acknowledged that the misconduct of those firms that violate the law needs to be dealt with more effectively; and others called for a new vision for labor law that breaks out of the current highly adversarial pattern.

The issue dividing labor and management is not about the illegal actions of some employers or unions but about how the current operation of the law affects the ability of workers to organize. No one before the Commission condoned the tactics of employers who violate the law.

On the union side, the trend in union representation shown in Chapter I and the trend in NLRB election results shown in this chapter illustrate why union leaders are gravely concerned about the operation of the law in general.

The Commission received testimony from union leaders that the primary problem facing workers who want to organize is not the illegal actions of some employers (although those actions harm an organizing campaign). It is rather, in the words of

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[17] Professor Richard Hurd of Cornell and several union representatives provided additional case studies of employee experiences.

AFL-CIO President Lane Kirkland, "veiled threats and acts of discrimination which cannot be proven to be unlawfully motivated."

Union witnesses felt that employers had certain advantages in NLRB election campaigns: access to the workplace and to employees during working time, and exercised their economic power over employees to override the right to free representation:

> "The reality of employer opposition and the kind of latitude employers have in how they campaign under current law has totally invaded the way that unions select and run campaigns ... and a clearly defined bargaining unit...organizing a union today is so risky, it's so hard, it's so technical, and so scary for workers, that only the most resourceful, the most fed-up, and the most heroic workers will even pursue it ." (Allison Porter in testimony before the Commission.)

Based on their experiences union representatives recommend various changes in the representation system, such as: stronger penalties to deter unlawful employer conduct, expedited procedures to remedy such conduct, an equal time provision to give workers the same access to union spokepersons as they have to management spokespersons, an obligation of an employer to recognize a representative designated by a majority of employees through authorization cards, and interest arbitration to guarantee a first contract to employees who vote for a union.

The employers do not believe the trend in union representation is due to any flaws in the NLRA and are opposed to those changes advanced by labor.

The Commission heard testimony from management representatives that they did not feel that unfair labor practices contributed to the difficulty of organizing. Employers further contend that a meaningful campaign is an indispensable means for enlightening employees about the issues before they cast their secret ballot vote for or against union representation.

Overall, both sides are in apparent agreement that employer resistance to unionization reduces the probability of a union election win, and thus of the establishment of a collective bargaining arrangement.

One question that is often raised is whether any significant number of workers currently not covered by collective bargaining in fact want such coverage.

Public opinion surveys provide some evidence on this question for the millions of American workers who are not involved in NLRB election campaigns. These data while informative about attitudes, do not tell us how workers would in fact vote in an NLRB representation campaign after management and unions gave their respective arguments nor how they would vote in such campaigns absent unfair labor activities, or in an environment with less stringent employer opposition.

Public opinion surveys on this issue tell a fairly consistent story from 1977 through 1991: approximately 30 percent of the non-union workforce typically answers "yes" to questions normally worded as follows: "If a union representation election were held on your job, how would you vote?" Non-Whites are generally twice as likely to express desire for unionization as Whites; women also often tend to express a greater preference for unionization than men.

If the 30 percent figure is applied to the number of private sector workers covered by the NLRA and not in unions, approximately 15 million nonrepresented workers may indeed want representation.[18] Many of these workers may be at worksites where the majority of employees do not want representation. Some will be at worksites where the majority does want such representation. While the NLRA protects the concerted activity of nonunion employees as a group, the doctrine of exclusive representation makes minority unionism or nonunion concerted activity by workers rare in the United States.

Information was presented to the Commission regarding the results of representation elections in the public sector. Over the past three decades, 36 states have enacted laws allowing some or all of their public employees to organize and bargain collectively. Certification win-rates by unions in public employment are high, in 1991-92 averaging 85 percent nation-wide, reflecting substantial union wins in the elections. Studies show that the union win rate in public sector elections exceeds their win rate in private sector representation elections in the same state.[19] The reasons for the difference in union success in elections in the two sectors is an issue for debate. Union representatives testified before the Commission that they believed an important reason was that public employers seldom campaign against union organizing and that employees believe if they vote union the outcome will be a collective bargaining contract.

The Commission has not sought to determine the role of particular campaign tactics, legal or illegal, on the outcome of NLRB elections nor the reasons for the decline in the proportion of workers covered by collective bargaining in the United States.

Many factors are undoubtedly at work behind these trends, including management actions, union actions, government regulations, and the changing needs of workers and their assessment of how best to meet those needs. The relative influence of these (and other) factors would be very difficult to determine, including the significance of unfair labor practices.

There is disagreement about the relationship between unfair practices and legal employer and union tactics in NLRB elections and the declining success of unions in representation elections.

There is no disagreement that illegal discharges and related illegal activity harm the lives of the individual employees who were fired, and that the legal and administrative process should afford those employees effective redress and try to reduce illegal activity.

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[18] This is a conservative estimate obtained by applying 30 percent to the approximately 58 million private non-agricultural wage and salary workers covered by the law who are not union members. We obtained the 58 million by adjusting downward the roughly 65 million private non-agricultural wage and salary workers who are covered by the law by the 11 percent of workers who are union.

[19] Kate Bronfenbrenner and Tom Jurawich. The Current State of Organizing in the Public Sector: Final Report. Transcript, February 24, 1994.

7. Summary

Part A of Chapter III has focused on how effectively the NLRA works in providing American workers the free choice to choose whether or not to bargain collectively with their employers, which is the unifying principle on which labor, business, and the American people concur.

Only a small proportion of the U.S. workforce is involved in NLRB representation elections and only a small number of employers and unions have been found guilty of violations of the NLRA. Still, the issues in this Chapter are important to U.S. employee-management relations. They are important because NLRB representation elections are the way the nation offers workers the right to choose union representation and because conflicts in this arena can create an atmosphere of conflict and confrontation in worker-management relations throughout the economy.

Our principle findings are summarized in the following points:

1. **American society -- management, labor, and the general public -- support the principle that workers have the right to join a union and to engage in collective bargaining if a majority of workers so desire.**

2. **The number of NLRB elections held, the number of workers in elections, and the number in units certified for collective bargaining has diminished.**

3. Representation elections as currently constituted are a highly conflictual activity for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial.

4. **The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time. Unions as well as firms have engaged in unfair labor practices under the NLRA. The bulk of meritorious charges are for employer unfair practices.**

5. **The legal relief afforded individual employees fired for exercising their rights under the NLRA was designed to be remedial. The legal relief afforded individuals under more recent employment law is more severe.**

6. **Relief to employees whose employer has bargained in bad faith with them requires the employer to cease and desist such tactics.**

7. **Roughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer.**

8. **There is a dismal side to American labor relations in which the rights of some individual workers are violated by some employers who resist the effort to organize.**

The analysis of Part A poses a host of questions about possible labor law reforms, to which the Commission will be looking for information from interested parties and the general public. Here are some critical questions for further discussion:

- How can the level of conflict and amount of resources devoted to union recognition campaigns be de-escalated?

- What new techniques might produce more effective compliance with prohibitions against discriminatory discharges, bad faith bargaining, and other illegal actions?

- Should the labor law seek to provide workers who want representation but who are a minority at a workplace a greater option for non-exclusive representation?
- Should unions be given greater access to employees on the job during organizational campaigns, and if so how?
- What if anything, should be done to increase the probability that workers who vote for representation and their employers achieve a first contract and on-going collective bargaining relationship?
- How might cooperation in mature bargaining relationships be increased?

EXHIBIT III-1
Final Outcome of NLRB Union Representation Elections in Cases Closed

Year	Total Number Elections	Total Number Elections Won	% Won	Total Eligible Voters	Size of Newly Certified Units (in % of Employees)	% of Eligible Voters in Newly Certified Units
1950-54	5,906	4,257	72.1	715.541	554,098	77.4
1955-59	4,731	3,013	63.7	443,770	277,707	62.6
1960-64	6,780	3,944	58.2	495,593	273,026	55.1
1965-69	7,374	4,419	59.9	545,057	302,031	55.4
1970-74	7,911	4,297	54.3	538,108	248,402	46.2
1975-79	7,593	3,746	49.3	488,226	181,352	37.1
1980	7,296	3,498	47.9	478,821	174,983	36.5
1981	6,658	3,019	45.3	403,837	147,353	36.5
1982	4,247	1,857	43.7	258,626	86,439	33.4
1983	3,483	1,663	47.7	171,548	76,659	44.7
1984	3,561	1,655	46.5	211,696	92,231	43.6
1985	3,663	1,745	47.5	217,331	78,073	35.9
1986	3,663	1,740	46.5	223,018	76,272	54.2
1987	3,314	1,608	48.5	204,235	81,396	39.9
1988	3,509	1,736	49.5	211,438	85,525	40.4
1989	3,791	1,878	49.5	247,638	98,709	39.9
1990	3,623	1,795	49.5	231,069	79,814	34.5

EXHIBIT III-2

NLRB ELECTIONS (1975-1993)[1]

Median Days from Filing of Petition to Election

Intervals	1975 Cases	1975 %	1980 Cases	1980 %	1985 Cases	1985 %	1990 Cases	1990 %	1991 Cases	1991 %	1992 Cases	1992 %	1993 Cases	1993 %
0 to 30 Days	992	11.0	729	9.0	387	8.1	258	6.2	224	6.0	263	7.5	231	6.6
31 to 60 Days	5222	57.9	5004	61.8	3425	71.4	3001	72.1	2740	73.2	2498	71.4	2530	72.3
61 to 90 Days	1812	20.1	1782	22.0	790	16.5	693	16.6	603	16.1	541	15.5	552	15.8
91 to 120 Days	458	5.1	321	4.0	110	2.3	100	2.4	77	2.1	89	2.5	83	2.4
121 to 150 Days	175	1.9	85	1.0	34	.7	41	1.0	36	1.0	40	1.1	27	.8
151 to 180 Days	100	1.1	45	.6	13	.3	19	.5	11	.3	15	.4	20	.6
181 or Greater Days	257	2.9	132	1.6	38	.8	52	1.2	50	1.3	53	1.5	55	1.6
TOTALS	9016[2]		8098		4797		4164		3741		3499		3498	
Median Days	50		50		48		49		49		48		49	

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[1] This table is based on initial representation election cases processed by NLRB regional offices during a given fiscal year (tallied from Regional Monthly Report 4770). Note: R cases statistics in the NLRB Annual Report are based on cases closed during a fiscal year and include blocked and consolidated cases.

[2] Reporting of 1975 data is subject to error since the current casehandling tracking systme was not in place in 1975. Accordingly, some information may not correspond to that in other reports on the same subject.

Exhibit III-3
Unfair Labor Practice Charges Against Employers

Year*	Total Number of 8(a) Charges	% of Charges Found Meritorious	Total Number of 8(a)(3) Charges	Total Number of 8(a)(5) Charges	Backpay Awards (Number/Average Amount)		Employees Offered Reinstatement
1950-54	4,345	32.9	3,036	1,266	2,940	$ 458	2,194
1955-59	5,175	21.8	3,993	1,047	1,627	495	9,437
1960-64	9,067	33.9	6,746	2,279	4,349	444	2,876
965-69	11,397	37.4	7,657	3,902	9,156	517	4,180
1970-74	16,428	34.6	10,684	5,306	6,407	846	4,317
1975-79	25,199	37.9	15,912	7,420	8,729	1,607	4,817
1980	31,281	42.6	18,315	9,866	15,433	2,050	10,033
1981	31,273	40.2	17,571	9,815	25,793	1,415	6,463
1982	27,749	40.1	14,732	10,898	N/A	N/A	6,332
1983	28,995	42.5	14,866	12,211	17,984	1,713	6,029
1984	24,852	41.1	13,177	10,349	34,863	1,050	5,363
1985	22,545	41.4	11,824	9,186	18,482	2,066	10,905
1986	24,084	42.6	12,714	10,131	17,635	1,937	3,196
1987	22,475	41.4	11,548	9,760	17,175	2,093	4,307
1988	22,266	44.4	11,196	9,501	17,496	1,928	4,179
1989	22,345	45.0	11,567	9,479	18,956	3,007	4,508
1990	24,075	43.9	11,886	10,024	16,082	2,733	4,026

*Numbers represent annual averages.

EXHIBIT III-4

Discriminatory Discharges During NLRB Elections[1]

Five Year Period	Reinstatement Offers Arising From Certification Elections[2]	Ratio of Workers Offered Reinstatement to Workers Voting for Unions[3]	% of Elections Producing Reinstatement Offers[4]	% of Workers Involved in Elections Whose Units Voted to Unionize[5]
1951-1955	608	1/689	5%	75%
1956-1960	429	1/584	4%	59%
1961-1965	1019	1/272	8%	56%
1966-1970	1346	1/225	8%	54%
1971-1975	1473	1/171	8%	43%
1976-1980	2238	1/92	14%	37%
1981-1985	2855	1/38	32%	38%
1986-1990	1967	1/48	25%	38%

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[1] The figures in this Table represent annualized averages for each five year period reported.

[2] The figures in this column represent the number of all reinstatement offers recorded by the NLRB, reduced to reflect only those resulting from firings that took place during representation election campaigns. The figures do not represent all election-time discriminatory discharges, but only those leading to the particular remedy of reinstatement. In other words, they do not account for 1) illegal firings not reported to the NLRB; 2) those reported to the NLRB but not producing an NLRB charge or complaint; 3) those producing a complaint but not a favorable resolution; 4) those resulting a favorable resolution not including reinstatement, such as an award of back pay.

Robert J. LaLonde and Bernard D. Meltzer developed the method for estimating the portion of reinstatement offers attributable to election-period firings in "Hard Times for Unions: Another Look at the Significance of Employer Illegalities," 58 U. Chi. L. Rev., 953 (1991). The figure is derived by 1) multiplying the gross number of Board-adjudicated or settled reinstatment cases by 0.51, the fraction that arises in the election context, and 2) multiplying that product by 2.2, the estimated number of persons offered reinstatement in each case. Lalonde and Meltzer looked at a period beginning with 1964, the first year the NLRB reported the number of reinstatement cases (in addition to its long reported figure for the number of individuals offered reinstatement). We employed a method suggested by Professor Lalonde in order to extend this figure back before 1964. We multiplied the number of individuals offered reinstatement by 0.30, which represents the ratio between individuals offered reinstatement as a result of election-period firings and all individuals offered reinstatement for the period 1964-1969. Sources: 16-55 NLRB Annual Reports Table 4 (1953-1990), Table 3 (1951-1952).

[3] This column shows how many workers voted to unionize for every one worker offered reinstatement as a result of an illegal firing during election campaigns. The figures are derived by dividing all workers voting to unionize in NLRB elections by the number of election-time reinstatement offers (column one). The figures may be turned into percentages simply by dividing the numerator by the denominator. Thus, .14% of workers voting to unionize were fired and offered reinstatement in the early 1950s, whereas 2% were in the late 1980s. The source for the number of pro-union voters is 16-55 NLRB Annual Report Table 14 (1951-1990).

The column analogous to this one in Lalonde and Meltzer's table contains two errors which taken together, understate the steepness of the rise in the percentage of union supporters illegally fired from the early 1960s to 1980s. For the period 1964-1969, the appropriate figure is 1/219, not 1/209. For 1980-1984, the correct figure is 1/48 not 1/57. These corrections indicate that illegal terminations were somewhat less of a problem in the early 1960s and more a problem in the early 1980s than their table suggests. Their mistake for 1964-1969 appears to be a simple arithmetical one. As for 1980-1984, they arrived at the wrong figure by forgetting to eliminate the number of pro-union voters in 1982 from the equation. The other side of the equation for 1982, the number of "discriminatory discharges" (reinstatement offers), was already eliminated because the NLRB did not publish the relevant figures for that year.

[4] The figures in this column are derived by dividing the number of reinstatement offers arising in the election context (column one) by the number of collective bargaining elections. The source for the annual number of elections is 16-55 NLRB Annual Report Table 13 ("RC" and "RM" elections only) (1951-1990).

[5] This column represents what one might call organized labor's effective yield in NLRB elections. It reveals the percentage of workers in such elections whose group ended up unionizing. The percentages are derived by dividing the number of workers in units that voted to unionize by the total number of workers eligible to vote in NLRB elections. The source for both halves of the equation is 16-55 NLRB Annual Report Table 13 (1953-1990), Table 10 (1952), Table 12 (1951).

EXHIBIT III-5
Unfair Labor Practice Charges Against Unions

Year*	Total Number of 8(b) Charges	% of Charges Found Meritorious	Total Number of 8(b)(2) Charges	Total Number of 8(b)(3) Charges	Backpay Awards (Number/ Average	Amount)
1950-54	1,247	29.2	736	141	742	$ 194
1955-59	2,300	28.9	1,482	157	256	360
1960-64	4,231	30.5	1,827	284	201	494
1965-69	5,585	31.8	1,587	453	125	1,002
1970-74	8,657	31.8	1,743	653	324	763
1975-79	11,503	27.3	1,760	858	373	1,999
1980	12,563	29.7	1,690	913	285	1,740
1981	11,882	28.3	1,513	945	460	1,619
1982	10,230	26.0	1,514	778	N/A	N/A
1983	11,526	27.8	1,749	1,158	437	1,055
1984	10,580	26.5	1,660	991	329	4,567
1985	10,065	28.7	1,420	825	158	5,940
1986	10,259	27.9	1,324	735	509	1,823
1987	9,495	27.7	1,298	716	171	20,549
1988	9,111	27.2	1,171	638	142	6,366
1989	9,928	26.5	1,250	616	210	2,758
1990	9,684	25.4	1,269	649	344	1,434

*Numbers represent annual averages.

SOURCE; Statistics provided by the NLRB to the Commission. Section (8)(b)(1) charges against unions are for re-training or coercing employees in exercise of their statutory rights...; in (8)(b)(2) cases unions are charged with discriminating against employees; in (8)(b)(3) cases unions are charged with bad faith bargaining.

EXHIBIT III-6
Estimates of the Outcome of Certification Cases

		Fiscal Year 1986 to Fiscal Year 1993
	Number of Cases	Percent of Cases
Number of Certifications	10,783	100.0
Reason for Closing the Case		
Agreement Reached	6,009	55.7
Diverse Factors for Closing	488	4.5
Question of Representation	580	5.4
Referred to NLRB	563	5.2
Plant Closed	341	3.2
Other	2,802	26.0
Strikes of Certification Cases	356	100.0
Agreement Reached	191	53.7
Diverse Factors for Closing	3	0.8
Question of Representation	18	5.1
Referred to NLRB	27	7.6
Plant Closed	8	2.2
Other	109	30.6

SOURCE: Tabulated for the Commission by the Federal Mediation and Conciliation Service.

EXHIBIT III-7

Allison Porter, Director of Recruitment and Training
AFL-CIO Organizing Institute

"I believe regular people with ordinary concerns about their jobs . . should be able to choose union representation and have an accessible mechanism for achieving it. Sadly, that is not the case in America today . . . When [workers] hear what the process actually is -- signing up a majority, requesting the federal government to conduct an election, then waiting several weeks or months for an election to occur -- the first question you hear is, can I be fired? New organizers are usually daunted by this question. "If I'm honest, I'll scare them away. If I'm not, and something happens, how will I live with myself?". . . It's every organizer's job to develop the ability to confront and work through worker's fears. In my experience, fear is the number one obstacle to workers supporting a union in an organizing drive. It starts out as fear of retaliation, then becomes fear of losing what they have, fear of the union as it is described by management, fear of strikes and plant closings, until finally it just becomes fear of change."

Clifford Erhlich, Senior Vice President of Human Resources
Marriott International

". . . most American companies would prefer operating without a union present at the worksite . . . [The reason is that] in the swirling seas of change sweeping over the workplace there remains all too often one island of constancy -- organized labor's view of the employment relationship. That view, unfortunately, has kept many labor leaders in a mindset that sees employee needs and company interests in perpetual conflict. I would refer the Commission to a quote from a recent article in Labor Research Review by Joe Crump, Secretary-Treasurer of the United Food and Commercial Workers Local 951, who testified before a panel of the Commission.

> "Organizing is war. The objective is to convince employers to do something that they do not want to do. That means a fight. If you don't have a war mentality, your chances of success are limited."

If Mr. Crump's quote represents how a union approaches an unorganized worksite, I have a difficult time understanding why anyone should be surprised that most companies respond in kind.

EXHIBIT III-8

The Human Face of the Confrontational Representation Process

> "The federal Commission on the Future of Worker-Management Relations heard two stories about those relations in Louisville yesterday. One story told of cutting-edge programs for cooperation and training. The other told of workers trapped in ... the dark ages of labor-management antagonism." (Joe Ward, The Courier-Journal, Sept 23, 1993).

Testimony given by Judy Ray at the Regional Hearing in Boston, Massachusetts on January 5, 1994 recounted:

> "I was a ten year employee of Jordan Marsh, in Peabody, up until this day after Thanksgiving, on which I was fired. I was fired, I truly believe, solely because I was a union organizer within the store. I was a dedicated employee, for ten years, for that company ...
>
> I cannot impress upon you what an organizer, what an employee who is just fighting for their rights in a campaign, goes through this day and age. I wouldn't have believed it, myself. I have been followed, on my day off, to restaurants, by security guards with walkie-talkies. I had an employee, a management person, assigned to work with me eight hours a day, five days a week, who was told he was there solely to work on me, to change my ideas about unions.
>
> I was timed going to the bathroom. I could go nowhere in my workplace without being followed. It's a disgrace. It's harassment beyond what I could ever tell you. Unless you have lived through it, you couldn't know what it feels like. ..." [1]

At its Regional Hearing in Atlanta on January 11, 1994, the working party heard testimony from Mrs. Florence Hill of High Point, North Carolina, whose firm, Highland Yarn Mills, decided to undertake a drive to decertify an existing union. Mrs. Hill is the wife of the local union president:

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[1] The NLRB issued a formal complaint against Jordan Marsh, alleging that the store discharged her because of her union activities. On April 11, 1994, Ms. Ray filed a suit in Essex County Superior Court for violating her civil rights through intimidation and coercion, falsely imprisoning her for two hours before firing her, defaming her character, injuring her career and causing her emotional stress.. See Meg Vaillancourt, "Clerk Wins NLRB Decisions, Sues to Get Former Job Back," The Boston Globe, Tuesday, April 12, 1994.

> I was not allowed off of my little section that I worked in. When I'd go to the bathroom, the supervisor would follow me. Anywheres I went, I was being followed. I'd go take my break; they'd cut me down to two 10-minute breaks and a 15-minute break. I was checked. I'd go through the mill. I'd always been a happy-go person, I could speak and I -- you know, be friendly with people. But I got, as time -- I'd have to hold my head down when I walked, because I didn't know what I was going to see, I didn't know what these people were going to do to me....
>
> And then, the stress got so bad that I did have a heart attack. But when I came back, they didn't let up on me. They continued even worse than what they were doing in the beginning. And my supervisor made the remark that he didn't know how I had been taking what I was taking without walking out the door or dropping over dead. That was what they was waiting for, is for me to drop over dead ...
>
> And it was all because that we stood up for what we believed in, for what we thought was right, and for what we thought the other people wanted. The people wanted the union there; we've had it there all these years. And, yet, they did this campaign against us, and it was terrible."

In Louisville, the Commission working group heard testimony from Carol Holman and Steve Lazar on September 22, 1993, about the blacklisting of nurses for seeking to exercise their legal rights. Here is Ms. Holman's testimony:

> "In June of 1988 I was employed by Humana Audubon on Four East. Because of my concern for understaffing and other conditions affecting patient care, I became active in the NPO (Nurses Professional Organization). I openly spoke for the union. ... On August 1st, 1989, I and my friend, who was also active in NPO, were so frustrated and upset with the conditions of understaffing on our nursing unit that we resigned our positions at Humana Audubon. ...
>
> It was a time of the nursing shortage when all hospitals were desperate to recruit nurses. Jewish Hospital at that time was anxious to recruit nurses and offered a hundred dollars to each -- to all nurses who agreed to come for an interview. My friend and I both went to Jewish and were paid a hundred dollars to do interviews. Jewish Hospital hired us for the Transitional Care Unit. The critical care supervisor

> called us and had arranged for us to attend the critical care classes. We had our physicals, TB skin tests, chest X-rays, and other lab tests. We were told to report to work on TCU at Jewish on September the 25th..

On September 20th we each received by UPS Next Day Air at our homes the following letter from Jewish Hospital: Quote, "We regret to inform you that we have no position of employment for you.". The letter was signed by the Vice President of Human Resources at Jewish. My friend and I went to Jewish Hospital and asked to speak with him. He was there, but would not see us. ... On September 26, Jewish Hospital ran a nurse recruitment ad in the Courier-Journal listing TCU as a unit where positions were available.

I had a very good evaluation at Humana-Audubon, a 3.6. A 3.0 is a satisfactory-plus. A 4.0 is excellent ... In all, I received on my evaluation a total of 22 fours and fives. Despite this very good evaluation, Audubon marked me as ineligible for rehire on the personnel form. ...

We knew we had been blacklisted ... It was very scary when my friend and I received the letters from Jewish Hospital denying us our TCU jobs for which we had just been hired. We knew deep in our hearts that there was no reason for this. Someone had to be out to get us. It was very devastating...

Mr. Lazar, former manager in the employee relations department at Humana, Incorporated, testified:

> "I was present in the office of the human resource director of Audubon Hospital when he received a call from the human resource director of Jewish Hospital about Carol and her friend. The conversation I overheard was directed at the fact that both nurses were considered to be union red hots, very active in the Audubon campaign, extremely pro-union individuals. The Audubon human resources director went to so far as to say, "You probably don't want them working for you."...
>
> "I fully expect that by testifying as I have today every effort will be made by Humana to discredit me. But my testimony is not rumor, it is not innuendo, and it is certainly not falsehood. Rather, I have told you what I have seen, what I have heard, and what I have personally done to combat unionizing efforts."

In its East Lansing Hearings on October 13, 1993, the Commission working party heard the testimony of an employee in a unit that had voted for a union but which had not been able at that time to negotiate a first contract:

"I am on the bargaining committee for a union certified to represent employees of a food processor in Eastern Michigan ... Because we are still in bargaining, I'm not going to give my name or the employer's name, because I don't know what he'd do if he knew I was even here right now. He might fire me, he might not, I don't know and I don't want to take the chance.

"... I make $6.80 an hour ... About over two-thirds make less than $6.00 an hour ... We have no benefits, no health insurance, no meaningful pension, nothing, nothing to go on. ... So low wages and benefits were an obvious reason why we went for the union.

"And the other reason is, we have no voice in this work place. He don't listen to anything we have to tell him. Example ... five people come down with some kind of rash that they got off of the sauce or something they were allergic to. Their skin started cracking, it started bleeding. He wouldn't even give them gloves to wear ... he told them if they wanted to go to the doctor they got to go on their own and pay for it out of their own pocket. He wouldn't acknowledge that it come from that shop.

"... we started organizing in April of '92 ... we won by a three to one vote, and he filed objections to it ... it took a year for certification ... after the certification he wouldn't bargain with us. ... he offered us a raise if we would sign a petition saying that we did not want a union there.

"Then he withheld our annual wage increase, and we haven't gotten nothing since. So when we filed these charges they were settled and that's when he come to the table and started bargaining with us ... We've been to seven meetings that we've had with him; nothing's been done ... He has not agreed to anything ...

"... me and my fellow workers, we need our jobs. We don't want to strike, we don't want to walk out ... If we can't even get a first contract, we're in big trouble,

These stories are representative of testimony presented to the Commission by individual citizens.

Part B

Experience with "Contingent" Workers and Other Sectors

1. "Contingent" Worker-Management Relations

As noted in Chapter I.20, one of the significant developments in the American economy in the past decade or two has been the growth in the number and proportion of workers with relationships to those that provide job opportunities that diverge from full-time continuing positions with a single employer. This cluster of types of worker-management relations, or self-management arrangements, has been expanding, but there are few reliable statistics beyond those summarized in Chapter I.20.

These marginal job relations to a single employer have always existed in American labor markets. Hiring halls and various other arrangements have been developed to match worker qualifications and availabilities with the fluctuating and specialized demands of employers in such industries as maritime, construction, home nursing, printing and hotel banquets. But these contingent work relations now encompass many more workers and take ever more forms.[1] The term "contingent workers" often includes part-time workers, some of whom are voluntarily part-time, some of whom would like full-time work, and some of whom are multiple job holders. It also includes employees of temporary help agencies - who may be full-time workers - and some of the self-employed including "owner-operators" or independent contractors with only a single contract of employment.

The Commission encountered many reports of these diverse worker-management arrangements in its hearings and in written submissions:

In the cleaning of office buildings, in some cities, owners have sub-contracted the cleaning to businesses who may perform the work with their employees or even franchise parts of the work to groups of workers.[2]

Many public and private employers have sub-contracted activities to enterprises using the same workers part-time performing identical tasks at lower benefits and wage rates.

In trucking, agriculture and construction the device of owner-operator has expanded rapidly.

Temporary work agencies have grown in white collar and specialized occupations.

Homework and sub-contracting has expanded in a number of sewing industries.[3]

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[1] See, Francoise J. Carre, Virginia duRivage, and Chris Tilly, "Piecing Together the Fragmented Workplace", Unions and Public Policy on Flexible Employment, Lawrence G. Flood, ed. (forthcoming), and Dorothy Sue Cobble, "Making Postindustrial Unionism Possible", Rutgers, October 1993.

[2] The Commission was told of a large Seattle cleaning contractor which, after its low bid won the contract for a number of commercial buildings, sold the franchise to clean individual floors to a largely immigrant workforce.

These developments reflect market pressures on labor costs and the need for flexibility. They also at times result in the avoidance of social security taxes, workers' compensation, unemployment insurance and benefits such as health insurance and pensions. These arrangements often attract new immigrants, minorities and women in the labor force. As Chapter I.20 noted, the problem is how to balance employers' needs for flexibility with socially determined job protections and labor-relations statutes.

Introduction of these contingent relationships just to reduce the amount of compensation (whether wages or benefits) paid by the firm for the same amount and value of work raises serious social questions. To the extent that free collective bargaining is considered a valuable instrument for protecting the economic and personal situation of both contingent and regular workers, the predominant industrial model of unionism is somewhat ill-suited for this task, based as it is on the actions and representation of a group of employees who work together for a single employer. The NLRA framework for collective bargaining was, however, primarily designed for this kind of employment relationship and union representation.

Mr. John Sweeney, President of the SEIU, devoted a considerable part of his testimony to the human and economic situation of the contingent worker. He and other witnesses have placed the following important legal and policy issues before the Commission for its deliberations.

- What is the proper interpretation of the "community of interests between regular full-time and temporary or part-time workers for purposes of defining the "appropriate unit" within which representation decisions are made and collective bargaining carried on?

- Should the definition of "employee" be expanded (or supplemented) to bring under the NLRA workers who are labeled "contractors," but who function not as entrepreneurs but as individuals in a dependent relationship with the firm(s) for whom they work?

- Should the definition of "employer" be retailored to include the enterprise that owns the structure or finances the project on which work is being done, but utilizes a contractor to hire and manage the people who perform this work?

- Are the standard legal picture and restraints on representation, negotiation, and economic pressure suited for an employment world in which employee interests are focused much more on the sector within which they (hope to) work regularly, rather than on the specific firm for whom they happen to be working at any one time?

While the contingent worker issue was identified by labor representatives, the Commission realizes that it poses a number of important and complex questions about the application and enforcement of employment laws, such as the Fair Labor Standards Act,

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3 "Labor Relations and the Contingent Work Force: Lessons from the Women's Garment Industry," a statement submitted by Jay Mazur, President, International Ladies' Garment Workers' Union, April 29, 1994.

and labor-management statutes. The Commission intends to devote more attention to this subject.

2. Construction Sector

Some forms of "contingent" employment relationships have characterized the construction industry for more than a century.

The construction industry is large and diversified, widely spread throughout the country with specialized contractors and a skilled and relatively mobile workforce.

- In June 1992 the industry was composed of 622,975 establishments with the employment of 4.6 million. The industry contained 10.5 percent of all establishments and 5.2 percent of all employment in the economy.
- In June 1992 the industry contained 524,741 firms (legal entities), 11 percent of all firms.
- Construction is an industry of small business. In June 1992 425,000 firms had less than 10 employees (for a total of 1.15 million employees) while 120 firms had more than 1,000 employees (for a total of 290,000 employees).
- The number of single proprietorships or independent contractors with no employees has expanded greatly in the past several decades. One government estimate places the increase from 687,000 in 1970 to 1.46 million in 1990.

Many branches of the construction industry reflect significant cyclical and seasonal fluctuations in employment.

The major proportion of employees work on shifting construction sites which often contain variations in employees and crafts during the course of a single project or work site. These variations relate to the branch of the industry, the size of the project, and the diverse practices of contractors under collective agreements and those operating nonunion.

The Commission heard sharply different testimony and points of view from representatives of the collective bargaining and the nonunion segments of the construction industry.[4] The Commission would welcome further information and analysis of some of the factual information in contention:

- The extent to which construction activity and employment is transitory by firm -- and how this varies by sector and occupation and trade.[5]

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[4] The Building and Construction Trades Department, AFL-CIO testified on December 15, 1993 and the Associated Builders and Contractors, Inc. on January 5, 1994. Also see the Supplemental Statement of the Building and Construction Trades Department, AFL-CIO, of March 29, 1994 and the comments of the Associated Builders and Contractors, Inc. and the comments of the Associated General Contractors of America, both dated April 29, 1994. There are numerous other contractor associations in the industry that have presented no views.

[5] Data were furnished to the Commission from jointly-trusted benefit funds that give some indication of the variability of employment, at least in the unionized sector; l) The Massachusetts Laborers Benefit fund, for instance, reports for 1993 that of 8967 employees, 5208 worked for a single contractor averaging 1033 hours. But 1780 employees worked for 2 contractors, 871 worked for 3 contractors, 482 worked for 4 contractors, 252 worked for 5 contractors, 144 for 6 contractors, and so on, with 1 person having

- The union-nonunion differences, if any, in occupational safety and health enforcement and industry and fatality rates, again identifying construction sector characteristics and job classifications.
- The union-nonunion differential, if any, in the expenditures made by construction workers and firms in the acquisition and retention of skills through apprenticeship and other training programs.

Clearly, these and other questions are crucial to the Commission's appraisal of the human and social consequences of worker-management transformations in the construction work place.

Also vital is evaluation of the difference, if any, that labor law has made in the sharp drop in collective bargaining in the construction industry. The Associated Builders and Contractors, Inc. believes that the true explanation for the decline in building trade unionism is that construction workers now prefer this group's "merit shops" to traditional union representation. The Building Trades believes that it is employers, not employees, who have effectively made the decision to deunionize this industry, a decision they have been able to implement because of the apparent misfit between the general design of the NLRA and the special features of construction employment.

Though the original Wagner Act of 1935 made no exception for construction, the NLRB quickly decided not to exercise jurisdiction over this industry (Brown and Root, 1943). The Board adopted that "hands-off" policy because it believed that the legal framework for certification and bargaining decisions by stable units of employees could not sensibly be applied to a construction industry workforce that regularly moved from job to job and employer to employer. Formation and termination of labor-management relationships were left to voluntary actions by the parties themselves, with construction unions having the instrument of picketing and boycotts through which to secure their position in the industry.

In 1947, however, the Taft-Hartley amendments to the NLRA clearly brought construction under the orbit of the statute by subjecting building trade unions to section 8(b)(4)'s new ban on secondary boycotts and jurisdictional disputes. The significance of this new legal status became clear with the Supreme Court's 1951 Denver Building Trades decision, which restricted picketing at a construction site by a union representing one building trades craft that was also being worked by other contractors and employees from other trades. (As noted earlier, Section 8(b)(4) was and is an unfair

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reported working for 18 different contractors in a single year, 2) The National Electrical Benefit Fund reports a similar pattern of variability on a national basis. In 1992, while 63 percent of employees worked for a single contractor, 18 percent worked for two, 9 percent worked for three, 5 percent for four, 2 percent for five , and on up to those who worked for ten or more contractors in the year. 3) The Bricklayers & Trowel Trades International Pension Fund reports the following pattern of variability on a national basis. In 1992, while 58 percent of employees worked for a single contractor 23 percent worked for two, 9 percent for three, 5 percent for four, 2 percent for five, and on up to those who worked for ten or more contractors in the year.

labor practice provision with effective enforcement teeth).

When Congress returned to the NLRA in 1959, its Landrum-Griffin amendments acknowledged in two ways the special features of the construction employment relationship.[6] One was an exception to the new ban on "hot cargo" agreements, and the other was permission given to building trade unions and contractors to enter into "pre-hire" agreements, with NLRB-conducted votes reserved for after the fact, if the employees so desired. Subsequent decisions by the NLRB have, however, restricted the scope and effectiveness of both of these exceptions, at least as compared to what the building trade unions believed they had secured from the Congress in 1959.

Even more important, in the early 1970s construction firms developed and the NLRB endorsed a device called "double-breasting" (see Peter Kiewit Sons, 1977). What this label refers to is the ability of a single construction enterprise to operate one corporate entity for purposes of securing a contract on a project whose terms of employment are set by union agreements, and another corporate entity to work on nonunion projects at lower wages and benefits.

In the view of the Building and Construction Trades Department, the major issues in the legal framework of worker-management relations in the construction industry requiring change include:

- On the expiration of a pre-hire agreement, a contractor is free currently to repudiate the agreement without the obligation to bargain. (John Deklewa and Sons, 282 NLRB 1375, 1987).

- A contractor signatory to a collective bargaining agreement is free to establish a construction entity under its control that is not bound by the agreement and can bid and perform work through this entity on a non-union basis. (Peter Kiewit Sons' Company, 206 NLRB 562). The term "double breasting" or "dual shop" is used to characterize such activity.

- A general contractor and its sub-contractors or separate prime contractors working on the same job site are separate entities for purposes of the secondary boycott prohibition. (NLRB v. Denver Building and Construction Trades Council, 341 U.S. 675, 1951).

The Associated Builders and Contractors, Inc. opposes changes in the law advocated by the Building and Construction Trades Department. In particular, it opposes the "anti-dual shop" bills, the proposed change in "pre-hire" agreements, advocating that contractors be free to call for an election and escape at any time, under Section 8(f), and it opposes the changes urged in Section 8(e).

The Associated Builders and Contractors, Inc. provide a further list of matters that include the following to achieve "true labor law reform": federal laws to prohibit labor violence; enforcement of the Beck decision; amendment or repeal of the Davis-Bacon Act; make it unlawful for a public or private employer to require a sub-contractor to adopt a labor agreement as a condition of performing work, etc.

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[6] The garment industry has also long been characterized by contingent work relationships with its heavily immigrant and female labor force and with highly competitive manufacturing and sub-contracting arrangements. Congress expressly modified the NLRA in 1959 to give garment industry unions protection from "hot cargo" and secondary boycott provisions in cases involving "an integrated process of production in the apparel and clothing industry".

With the preceding brief background, the Commission poses the following questions for further presentations and deliberations:

- Is the source of the decline in collective bargaining in the industry the unattractiveness of union representation to the present-day construction worker, or resistance to unionization on the part of construction employers, or the inappropriateness of the general legal framework for representation to the special features of construction employment and what importance should be attached to each?
- Which, if any, of the provisions of the NRLA (or interpretations) should be altered?

To the extent that changes are warranted in the legal treatment of construction employment under the NLRA, can some or all of these be accomplished by the NLRB (perhaps via the Board's rule-making procedure), or should these issues by reserved for Congressional action?

3. The Railway Labor Act

The special legal treatment sought for the construction industry would not be unprecedented. Indeed, the Railway Labor Act (RLA) of 1926 was this country's first national labor-management relations law, one that was extended in 1936 to embrace the fledgling airline industry. The Commission held a session on October 20, 1993 at which management and labor representatives from both these industries offered their views about the present-day operation of the RLA. They also submitted subsequent statements and comments.

The factual evidence presented to the Commission reflects changes in the economy, the development of labor laws enacted after RLA, and changes in the Administration of the RLA. While representatives of railway and airline labor and management recognize that "there is much that could be changed for the better" under the RLA, they were virtually unanimous in contending that the primary purpose of the Act has been satisfied. That is, disputes between the parties have been settled through the Act's provisions for negotiation and mediation without resort to strikes or major disruption of the national transportation system. These representatives were united in the common and repeated refrain with respect to the RLA: "if it isn't broke, don't fix it." Nonetheless, the evidence reflects that there is room for improvement.

A brief overview of the history of the Act, and highlights of the significant differences between the RLA and the National Labor Relations Act follow. These elements are critical to understanding the impact of the economic changes that have occurred since the RLA's adoption.

A. Historical Overview

Enactment of the RLA in 1926 was the product of a consensus reached by railway management and railway unions, in stark contrast to the intense labor-management and partisan political conflicts that took place over enactment of the NLRA and all later amendment efforts. The original intent of the RLA was to provide mechanisms that would guarantee the continuity of interstate transportation service in the event of labor conflict. The unique provisions of the RLA were deemed necessary due to the crucial role of rail transportation in the free flow of interstate commerce.

The RLA created different mechanisms to achieve this goal, based on whether the dispute was a "major" dispute or a "minor" dispute. (These disputes are roughly analogous to disputes over collective agreements (major) and grievances (minor)). If the parties are unable to resolve a "major" dispute through direct negotiation, the dispute is subject to mandatory mediation through the National Mediation Board. If mediation efforts do not succeed, the parties have the option of proceeding to arbitration. If either party rejects the offer of arbitration, there is a 30 day status quo period, during which time the President may appoint an Emergency Board. Emergency Boards have been invoked 224 times in the last 67 years,[7] 191 times in the railroad industry and 33 times in the airline industry. Congress has been called upon 17 times to extend the status quo, to impose a settlement, or to provide for final and binding arbitration in the railroad industry.

In exchange for labor giving up the right to strike over "minor" disputes, these disputes are subject to mandatory arbitration. The government bears the expense of railroad arbitrations. The budget for grievance arbitration averaged $2.5 million a year for the period 1983 to 1992, or an average cost of $264 per grievance closed. Arbitrators in the airline industry are appointed to System Boards of Adjustment: each party shares the costs of the neutral arbitrator on the System Board.

The RLA was amended in 1981 to establish a special procedure for publicly funded and operated rail commuter service, including Amtrak. The procedures provide not only for a emergency board to report the facts (including recommendations), but should that report not settle the dispute, another emergency board may be created requiring each side to submit final and binding offers for settlement. This emergency board shall select "the most reasonable offer" and prescribed penalties are to apply to the party refusing to accept the award.

B. Differences Between the RLA and the NLRA

The railroad and airline industries under the RLA differ in a number of respects from other private sectors governed by the NLRA.

- Enactment and amendment of the RLA, and appointment of members to the National Mediation Board, has regularly been the product of consultation and consensus. Enactment and revisions of the NLRA and appointments to the National Labor Relations Board have been characterized by acrimony and conflict.

- Coverage under the RLA is limited to two major industries, railroads and airlines. The NLRA covers all other private industries, with specified exceptions.

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[7] In addition, a presidential commission was appointed under Executive Order 10891 to consider a series of work rules and manning issues. Report of the Presidential Railroad Commission, Washington, DC., February, 1962.

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- Representation under the RLA is based on the majority vote of all employees eligible to vote through a mail-in ballot. Representation under the NLRA is based on the majority vote of those who do vote, almost always in elections conducted at the work place.

- Employees under the RLA are represented for purposes of collective bargaining in nation-wide "class or craft" units for a single employer. Employees under the NLRA are placed in bargaining units that rest on the NLRB's judgment of their "community of interests," typically on a site by site basis.

- Employees in the two industries covered by the RLA are almost entirely represented by labor unions and governed by collective bargaining agreements. (Total employment in railroads in 1992 was 275,000, down from 1.2 million in 1950; in airlines, employment has risen from 76,000 to 540,000.)

- Arbitration over minor disputes is mandatory under the RLA. Arbitration is a negotiable and occasionally contentious issue under the NLRA.

- Secondary picketing during a labor dispute is permissible under the RLA; it is prohibited in industries covered by the NLRA.

- Under the NLRA, collective bargaining agreements typically have specific termination dates. Contracts do not expire, as such, under the RLA. The contractual terms continue until Section 6 notices are filed and negotiations take place to amend, in whole, or in part, existing contracts.

- Under the RLA, the parties cannot seek self-help, i.e., strike or lock-out, until they are specifically released by the NMB, which in most instances does not occur for many months or years. Under the NLRA, parties can engage in self help, if they follow the notice requirements provided in the NLRA and in the collective bargaining agreement.

C. The Changing Economy

The changing environment depicted in Chapter I has had a distinctive impact on the railroad and airline industries.

- From the RLA's inception until the end of the 1970s, the two industries subject to the Act were highly regulated. Deregulation (of airlines in 1978 and railroads in 1980) had two major effects on the RLA industries. First, deregulation exposed the two industries to increased price competition, which resulted in downsizing or elimination of a number of employers. Second, those firms that survived found themselves competing against other firms covered by the RLA as well as some covered by the NLRA.

- In the 1930s, a railroad strike had great potential to shut down the entire country. A national or regional railroad strike rapidly affected many other industries that depended upon the railroads for essential transportation services. A strike could soon become a serious threat to the nation's economy and welfare. Today, the impact of a railroad or airline strike is questionable. On the one hand, adoption of "just in time" inventory management systems, such as those used by the major auto companies, risks shutdown of manufacturing operations within 24 to 72 hours of a rail strike. Moreover, in some parts of rural America, just as in the 1930s, there are no other viable freight options besides railroads. On the other hand, in most settings, the external impact of a strike has been sharply diluted. Due to the fractionalized nature of both train and air services, there generally are other transportation methods available. In 1926 railroads carried 80 percent of inter-city freight. Today, they carry under 30 percent.

- In the 1930s, the role of railroads (if not airlines) was unique in that no other industry had such an impact on the overall economy. Strikes in other industries principally affected the companies involved, their employees, customers and suppliers. This statement is no longer true. Other industries, e.g., communication, have as great or greater impact on the economy as a whole as did the railroads six decades ago.

- In the 1930s, coverage under the Act was clearcut. Firms providing similar services operated under the same rules. Today, due to the complexities of corporate structuring and the combinations of services provided, the line between an RLA covered and non-covered firm has become sometimes ambiguous. (For example, Federal Express is covered by the RLA while its competitor, United Parcel Service, is covered by the NLRA. The growth of inter-model transportation further complicates the separation.) As in other industries, the line between employer and employee is no longer clearcut. Not only has changing organization of work created new roles and blurred distinctions between managers and employees, but employee ownership and participation on corporate boards has become a regular response to financially troubled airlines.

- Administration of the RLA has become characterized by increased governmental involvement and excessive delay.

Over the last decade, average time taken to grant or dismiss certification petitions has ranged as high as 175 days for airlines and 130 days for railroads. During that same period, the number of RLA arbitration cases has reached as high as 14,000 in a single year -- an overall growth of ten percent during a period when employment has dropped by 30 percent.

-- In 1992 there were a total of 11,708 pending cases in all boards to hear minor disputes. In 1992 there were 7,755 cases docketed and 6,951 case closed. The National Mediation Board reports that "virtually all cases submitted to the National Railroad Adjustment Board have required the services of neutral arbitrators".

-- There is increasing litigation over what constitutes a "major" or a "minor" dispute, producing considerable delay before the cases can even make their way into the proper dispute system.

-- Average time spent in mediation of "major" disputes trebled over the last decade -- now taking three years after the parties had already engaged in direct bargaining.

-- Out of the 17 times that Congress has had to intervene in rail disputes, five occurred in the last ten years, giving Congress a role it does not relish. As Congressman Swift, chairman of the subcommittee that had handled the last two national rail shutdowns, noted in his written statement to the Commission:

> "Congress is not a body mandated or temporarily suited to interfere with complex labor-management disputes, some of which require the experts in the field to negotiate for 4 years and still they do not reach agreement. Yet, it comes to this body and we are somehow supposed to...resolve what the experts cannot resolve in years."

D. The Parties' Recommendations

As noted at the outset, representatives of both labor and management in the major railroad and airline firms concurred in their judgment that, by any measure, "RLA labor relations are in better working order than labor relations in the NLRA sector, the Federal Labor Relations Act sector, or any of the state or local public or private labor relations law sectors." For this reason, these constituencies stated emphatically to the Commission that they wanted their labor relations to be governed by the RLA, not placed under the NLRA. They further agree that "there is no compelling need to seek changes in the RLA and to risk the unforeseeable consequences that might result. Any defects in the system are attributable to its administration, not its statutory design."

In contrast, the group of smaller Regional Railroads of America, a coalition of 117 class II and Class III carriers with an aggregate of 10,000 employees, as well as some of the transit systems that have rail operations under the RLA, expressed a need for change. The problems unique to small railroads are highlighted by the class and craft distinctions which prevent the parties from cross-utilizing employees and can result in separate units comprised of just two or three people. The regional railroads claim that the resulting cumbersome negotiating process prevents their smaller lines from reaching effectively to today's competitive marketplace, and that a collective bargaining process more like that available in the traditional industry contracts governed by the NLRA could be more effective.

While recommendations for change were sparse, the following suggestions were made. Some parties called for the use of mandatory arbitration of major disputes to eliminate the need for emergency boards. Others called for a prohibition against permanent striker replacement to achieve the same results. Some advocated use of the NLRA model that counts only votes that are actually cast, rather than counting abstentions as a "no" vote. Some recommendations were made to revise RLA definitions so as to reduce the amount of litigation over who is covered and/or what constitutes a "major" or "minor" dispute.[8]

Summary

This initial factual inquiry has raised a number of important questions about the operation of the RLA. For example:

- Does interstate transportation still require all of the distinctive provisions of the RLA? Would the parties' interests be better served by utilizing (perhaps modified) provisions that now exist under the NLRA?

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[8] See National Research Council, Transportation Research Board, Compensating Injured Railroad Workers Under the Federal Employer Liability Act, 1994.

- If the special provisions of the RLA are still needed, are the right industries covered? Specifically, are there other industries that should today be brought within its coverage, and are there segments of the railroad and/or airline industry that need to be exempt from the RLA? How is the experience with commuter railroads to be evaluated? Even if the right industries are covered, have changes in the country's economic structure made the RLA's coverage tests obsolete?

- Has the administration of the RLA become so burdensome that it is counterproductive?

- Should the Federal Government continue to pay for grievance arbitration handling pursuant to Railroad Adjustment Boards and/or Public Law Boards under the RLA?

The Commission is mindful of the labor and management representatives who testified that the RLA was just fine: "If it isn't broke, don't fix it!" There was also, though, testimony to the contrary conclusion including the concerns voiced by members of Congress. While the Commission is respectful of some key parties' evident wish to be left alone, its stated mission requires that it at least consider these questions. The Commission is aware that some of the problem areas can be corrected under the current RLA regime (for example, by the National Mediation Board changing its procedures for resolving disputes more expeditiously and by more aggressive and effective mediation).

Before the Commission makes any recommendations, it will explore these questions and explore whether the problems can and will be addressed by the parties and the NMB in the context of the existing statutory framework.

Chapter IV

Employment Regulation, Litigation and Dispute Resolution

1. Introduction

The National Labor Relations Act (and the earlier Railway Labor Act) were the pioneering forms of federal legal regulation of labor management relations at the workplace. By the 1990s, though, a very different model of legal intervention, employment law, has come to play a much more prominent role both on the job and in the courts.

American employees have now been promised a wide variety of legal rights and protections by both federal and state lawmakers. These include minimum wages and maximum hours, a safe and healthy workplace, secure and accessible pension and health benefits once provided, adequate notice of plant closings and mass layoffs, unpaid family and medical leave, and bans on wrongful dismissal: these and all other employment terms and opportunities are to be enjoyed without discrimination on account of race, gender, religion, age, or disability. Implementation and enforcement of these legal rights against noncomplying employers requires litigation in the ordinary courts and/or administrative proceedings before specialized agencies. The dramatic surge in employment law disputes over the last quarter century has raised questions about the burden and distribution of these legal costs. At the same time, the complicated, lengthy, and expensive processes involved make it difficult for many ordinary employees to pursue a claim through these administrative and court proceedings. This is especially true for low wage workers, and those who lack the support of a union or other advocacy group in pursuing their legal rights.

Concern over these issues gives rise to the third charge to the Commission:

> "What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves rather than through recourse to state and federal courts and government regulatory bodies?"

Crucial to any such policy judgments are appraisals of both whether workplace litigation imposes unnecessary costs on employers, the immediate target of employment regulation, and whether the current procedures meet the needs of ordinary workers who are the intended beneficiaries of such public programs.

2. Evolution and Present State of Employment Regulation

The present body of federal and state employment law -- statutory, administrative, and judicial -- fills many volumes. Employment laws and regulations have expanded at an especially rapid rate since 1960. One study found that from 1960 to 1974 the number of regulatory programs administered by the Department of Labor tripled, growing from 43 to 134.[1] A current count would place this number much higher.[2] Some highlights are noted here.

A. Fair Labor Standards in the 1930s

An important legacy of the New Deal, the Fair Labor Standards Act of 1938 (FLSA), established a minimum hourly wage and required time and one-half pay for overtime hours worked by nonexempt employees. Administration of the FLSA, which covers both private and public employers, is the responsibility of the Wage and Hour Division of the Department of Labor.

B. Birth of Antidiscrimination in the Mid-1960's

The modern birth of federal employment law was inspired by the civil rights movement of the 1960s, which produced three major statutory regimes.

- The Equal Pay Act of 1963 (formally an amendment to the FLSA) prohibited gender-based differences in wages and benefits, unless the differential could be justified by factors not based on sex (such as seniority).
- The Civil Rights Act of 1964, in particular, its Title VII, prohibited discrimination by private firms (with at least 25 employees), not just in pay but also in hiring, firing, and other employment decisions, on grounds of race, sex, religion, and national origin.
- The Age Discrimination in Employment Act of 1967 (ADEA) extended the antidiscrimination principle to age-based decisions affecting employees over 40 years old working for firms of 20 employees or more.

The ADEA and Title VII are administered by the Equal Employment Opportunity Commission (EEOC), now located in the Department of Justice; however, legally binding verdicts under these statutes must be rendered through lawsuits filed in court.

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[1] "The Limits of Legal Compulsion," U.S. Department of Labor Release, November 12, 1975, Labor Law Review, Vol. 27 February 1976, p. 67.

[2] See Outline of Statutes and Regulations Affecting the Workplace, prepared by the Office of the Assistant Secretary of Policy, U.S. Department of Labor, June 21, 1993.

C. Expansion of Antidiscrimination Laws in the Early 1970s

A number of important expansions in the breadth and depth of federal antidiscrimination law took place in the early and mid-1970s.

- In two major rulings, the U.S. Supreme Court found that employer use of apparently neutral factors (such as high school diplomas or test scores) could be a violation of Title VII if this practice had a disparate statistical impact on members of a particular group and the employer could not justify its practice as a "business necessity" (Griggs v. Duke Power (1971)); and that the civil rights legislation of the post-Civil War era allowed minorities to sue for general and punitive damages suffered because of intentional employer discrimination in an employment contract (Johnson v. Railway Express Association).

- Executive Order 11246, first promulgated by President Johnson in 1965, amended by Executive Order 11375 in 1967, to ensure equal employment opportunities with firms that had contracts with the federal government, was intensified by President Nixon so as to direct all such contractors to develop and file affirmative action plans that set numerical goals and timetables for elimination of underutilization of women and minorities in their labor forces.

- The Equal Employment Opportunity Amendment Act of 1972 extended Title VII's coverage to state and local governments and to private firms with at least 25 employees, and allowed the EEOC, as well as the affected employee, to sue employers for violations.

- The Rehabilitation Act of 1973 prohibited employers with federal contracts from discriminating against employees with handicaps.

D. New Regulatory Targets in the 1970s

In the early 1970s the federal government enacted several statutory programs directed at serious workplace problems that potentially affect all classes of employees.

- The Occupational Safety and Health Act of 1970 (OSHA) imposed on employers the general duty to furnish their employees "a place of employment...free from recognizable hazards that are causing or are likely to cause death or serious physical harm," as well as to comply with a growing array of specific safety and health standards developed by OSHA in the Department of Labor.

- The Federal Mine Safety and Health Act of 1977 (MSHA) established analogous statutory and administrative obligations to protect the safety and health of the nation's mine workers.

- The Employee Retirement Income Security Act of 1974 (ERISA) enacted a program for regulating access, vesting, security, and fiduciary responsibilities in pensions and health and welfare benefits provided by employers to their employees.

E. Judicial Protection Against Wrongful Dismissal

From the mid-1970s through the mid-1980s, there were no major legislativeinnovations in employment regulation. During that period, though, the state courts across the country were transforming their traditional hands-off posture towards employment at will into a measure of legal protection against wrongful dismissals.

- One such source of protection is a tort action for discharges in violation of public policies, such as retaliation for an employee refusing to violate the law (e.g., commit perjury) on behalf of the employer, or for asserting their own legal rights (e.g., claiming workers' compensation benefits).
- A second source of protection is contractual, based on violation by employers of express or implied representations of job security (e.g., through personnel handbooks).
- A third source of protection is the general doctrine of "good faith and fair dealing," treated by some state courts as contractual and by others as tort-based (with the label used by judges making a real difference in potential damages).

By the early 1990s, 45 states had adopted one, two or all three of these legal doctrines, each of which is enforceable by individual suits filed in state or federal courts. Then,

- In 1987, the state of Montana enacted a broader Wrongful Discharge From Employment Act (WDFEA) which gave all nonunion employees broad legal protection against any form of "wrongful" dismissal, though with more limited damages in most cases.
- In 1991, the National Conference of Commissioners on Uniform State Laws agreed upon a Model Employment Termination Act (META) with important similarities and differences from the Montana example. META has not yet been adopted by any state.

F. Resurgence of Statutory Regulation Since the Late 1980s

Beginning in the later years of President Reagan's Administration, and continuing to the present time, there has been a revival of Congressional enactments targeted at workplace problems.

- The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for employers to hire illegal aliens and for employers to discriminate against legal aliens.
- The Employee Polygraph Protection Act of 1988 (EPPA) made it generally illegal for employers to force their employees to submit to lie detector tests.
- The Worker Adjustment and Retraining Notification Act of 1988 (WARN) required 60 days notice by covered employers (those with 100 employees or more) of pending plant closings and mass layoffs (generally those layoffs affecting 50 or more workers).
- The Americans With Disabilities Act of 1990 (ADA) prohibited discrimination by employers (as of July 1994, those with at least 15 employees) against disabled workers, and required reasonable accommodation of the workplace to the employee's disabling condition.
- The Civil Rights Act of 1991 revised several important Supreme Court rulings of the late 1980s (most prominently, Wards Cove Packing v. Antonio (1989), which had relaxed the Court's earlier "disparate impact" standard of discrimination in Griggs v. Duke Power (1971)), and significantly increased potential damages for intentional violations.

Most recently, the Family and Medical Leave Act of 1993 (FMLA) required public and private employers (with more than 50 employees) to grant up to 12 weeks of leave from the job (without pay but with continued health benefits) to employees who had given birth to or adopted a child, or who themselves, their spouse, or their children had developed a medical condition needing care.

In its forthcoming study,[3] the GAO identified a general framework of 26 key statutes and one executive order whose thousands of implementing rules constitute an intricate web of workplace regulation. A description of this major framework of federal workplace regulation is summarized in Exhibit IV-1. (See page 129.)

The number of laws and regulations governing the workplace have increased substantially since the 1960s creating a complex and expensive set of requirements for employers to administer and for employees in pursuit of their legal rights.

3. Nature of Employment Regulation

The body of employment law just recounted constitutes a very different model of government intervention in the workplace than does the national labor relations law depicted in Chapter III. The NLRA provides a variety of protections and procedures for employees choosing whether or not to pool their collective resources to try to negotiate better compensation and conditions of employment. The law, however, basically takes a hands-off attitude to the process and results of free collective bargaining between private employers and unions.

Employment law, by contrast, focuses on issues that are felt to be sufficiently vital to the body politic not to leave to private negotiations -- whether individual or collective. Some such concerns are directly financial: (e.g., what are the minimum wages that should be paid to people at work (under FLSA), and what must be done to insure the value and security of retirement income promised for the future (under ERISA)). But as described above, many employment laws tend to focus on value-laden issues like racial and gender discrimination, occupational hazards, privacy invasions, and the like. Public policy holds that all employees have equal protection against denial of their rights in these areas, whatever their (or their employer's) market power.

The reason these social standards are announced in mandatory legal form is recognition that some employers (perhaps also employees and their unions) are tempted by the financial and non-financial gains from non-compliance with these public standards. Equally important, law-abiding employers need protection against the unfair competition from non-complying employers' lower labor costs. Enforcement of employment law is pursued either through specialized administrative agencies (such as OSHA), or regular courts and juries (as under state wrongful dismissal law), or a combination of the two (the variety of antidiscrimination laws).

Handling and resolving disputes under such law enforcement vehicles requires considerable financial expenditures from employers, employees, and the public. A conservative estimate is that for every dollar transferred in litigation to a deserving claimant, another dollar must be expended on attorney fees and other costs of handling both meritorious and non-meritorious claims under the legal program.[4] Employers regularly spend much more than these direct costs of litigation to develop new personnel practices, operational procedures and equipment, and other measures to comply with the regulations.

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[3] United States General Accounting Office, Report to Congressional Requestors, Workplace Regulation, Agencies Need to Become Service-Oriented, Say Employers and Unions, 1994.

The difficulties encountered in fitting regulations to the diverse and changing employment relationships found in the modern economy and the many trade-offs among different policy objectives give rise to a continuous stream of questions and debates over the merits of specific employment regulations. Consider just a few of the current controversies brought to the Commission's attention.

- Should the fact that salaried employees are given unpaid time off work for personal reasons mean that they (and their colleagues in the same positions) are entitled under FLSA to be paid the overtime prèmium for extra hours that the employer requires them to work?

- Is obesity a disabling condition that should trigger protection of the antidiscrimination and reasonable accommodation requirements of the ADA?

- Does the transformation in technology and family life require different legal treatment of unconventional work schedules, and indeed of work performed entirely at home?

- Has the host of federal regulations and record-keeping promulgated since ERISA, intended to enhance the financial viability and accessibility of pensions and other benefits, in fact served more to reduce the willingness of employers to offer these benefits to their workforce?

- How, if at all, can one address under OSHA the serious hazards posed by guns and cigarettes to people working at their jobs?

- Is a mandate that employers pay for (the bulk of) their employees' health insurance the ideal vehicle for securing comprehensive and affordable health care coverage for American workers and their families?

- Which employer(s) are or should be held responsible for enforcing labor standards (e.g., safety and health) for temporary or contract workers?

Although concerns such as these are often raised about specific rules, the forthcoming GAO study referred to earlier found that most employers and union leaders accept the need for workplace regulations and support the broad social goals embodied in the laws governing the workplace. But these respondents were critical of the complexity and the "command and control" orientation of the agencies that administer and enforce these laws. What they desire is a more service-oriented approach to the administration of workplace laws.

It is not the Commission's task to judge the substantive merits of any of these laws or regulations. Instead, the question before the Commission is whether more efficient and equitable ways can be developed to administer, enforce, and resolve disputes involving the law of the workplace. Specifically, are there alternative methods for prescribing regulations, administering complaints and resolving disputes that arise under the variety of legal regimes -- federal and state, legislative and judicial -- summarized above?[5] A further question is whether alternative dispute resolution (ADR) mechanisms can render the positive benefits promised by regulation more accessible to and effective for ordinary workers.

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[4] James N. Dertouzos, Elaine Holland, and Patricia Ebenere, The Legal and Economic Consequences of Wrongful Termination (Rand Institute for Civil Justice: 1988), finds the compensation-legal costs ratio to be significantly worse than fifty-fifty.

Most employers and union representatives support the social goals of workplace laws and regulations but see them as highly complex and unresponsive to their needs. They would like to see a more service-oriented approach adopted to the administration and enforcement of workplace laws and regulations.

It is increasingly difficult to write and enforce standard regulations that fit well with the diverse employment settings and workforce and the changing workplace practices found in the contemporary economy. This is particularly true for the growing number of temporary or contract workers and the firms that employ them or utilize their services.

4. Trends in Employment Litigation

Exhibit IV-2 offers a glimpse of the array of forums, procedures, and remedies available under this country's law of the workplace. (See page 132.)[6] Some cases the individual employee alone can bring (e.g., wrongful dismissal suits); others only the administrative agency can file (e.g., FLSA). Some cases go directly to court (wrongful dismissal); some remain within the agency (OSHA); some go to the agency for investigation and then to the courts for adjudication (ADA), while some conduct adjudication within the agency but leave enforcement (and review) up to the courts (NLRA). Some legal rights carry open-ended compensatory and punitive damages (wrongful dismissal); some provide for general damages under a ceiling, but attorney fees are also assessed against losing employers (Title VII; ADA); while (as set forth in Chapter III) the NLRA is unique in restricting the damages assessed against guilty employers to the net back pay lost by the employee -- along with the prospect of reinstating the employee if the latter is willing to return to the position from which he or she was fired.

Table IV-3 (see page 134), based on suits in federal court, provides as good a statistical index as is available of how fast and how far employment litigation has been rising.[7]

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[5] As put by the Republican Statement of members of the House Committee on Education and Labor to the Commission (at page 15, referring specifically to the variety of EEO laws): "...it is important to note that the Commission should not attempt to change or alter the basic thrust of each law; rather, the Commission should seek to untangle the legal web of regulation that has spawned a cottage-industry for lawyers, consultants, and employment policy specialists."

[6] For detailed analysis, see Clyde Summers, "Effective Remedies for Employment Rights," 141 University of Pennsylvania Law Review 457, 1992.

[7] Exhibit IV-3 was based on data supplied to the Commission by the Business Disputing Group Project of Professor Joel Rogers of the University of Wisconsin and Terence Dunworth at the RAND Corporation. The data were generated by their assistant, Matt Zeidenberg, from figures supplied to the Project by the

(There are no systematic records of the rate of state court filings, whether the trends over time or the breakdown by type of suit). By the early 1970's, many of the key features of federal statutory protection were in place. During the two decades from 1971 to 1991, total civil suits filed in federal court were up 110 percent. Interestingly, (non-asbestos) personal injury suits, the usual targets of litigation critics, were up only 17 percent, not appreciably different from population growth. While suits under labor laws had actually dropped slightly, business-related suits by Fortune 1,000 firms had more than doubled. However, the annual rate of employee suits against employers was five times the number of twenty years earlier--and this was before the Americans With Disabilities Act of 1990, the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993 had come into effect.

In fact, the true leap in employment litigation was even higher than that visible in federal court figures. Though the precise numbers and trends are not available, it is clear that wrongful dismissal cases comprise a major share of employment suits filed in state courts. In 1971, there were only a handful of such discharge suits, because the doctrinal underpinnings for such claims had not yet been fashioned by state supreme courts. By the early 1990s, the best estimate we have is that employees are now filing 10,000 or so wrongful dismissal suits annually, with a total of 25,000 such cases now pending (the bulk in state courts).[8] Adding these state court numbers to the federal court figures in Exhibit IV-4 (See page 135) makes the aggregate rise in employment litigation even steeper.

Lawsuits filed in court are only the tip of the legal iceberg. In contrast to judicially-developed wrongful dismissal law, legislative programs give primary (under Title VII) or exclusive (under OSHA) jurisdiction to a specialized administrative agency. Exhibit IV-2 shows that in 1993, the EEOC received nearly 90,000 employee claims of discrimination by employers, up from 56,000 in 1981 (and up tenfold from 1966). The number of such administrative proceedings is roughly ten times the number of antidiscrimination suits eventually filed in court (only a handful of which are filed by the agency instead of the employee). In 1993, the Wage and Hour Division of the Department of Labor was receiving 46,000 employee complaints under the FLSA and initiating more than 2300 suits, while OSHA was receiving over 10,000 complaints and conducting nearly 60,000 inspections, leading to 9,000 cases. While a considerable portion of such government action potentially affords legal relief to employees with meritorious claims, every such action imposes legal costs on the targeted employers, many of whom turn out to be fully in compliance with the law.

Access to legal relief is not uniformly distributed across the labor force, especially under those laws that require the individual employee to initiate a lawsuit to secure a binding ruling. For example, only about one in ten suits under civil rights legislation is filed by an employee still on the job.[9] By contrast with the early life of Title VII, the vast majority of such suits currently com-

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Administrative Office of the U.S. Courts.

[8] Those rough estimates are developed in a paper by Lewis Maltby, Director of the American Civil Liberties Union's National Task Force on Civil Liberties in the Workplace, to be published in the November 1994 issue of Annals of the American Academy of Political and Social Science.

[9] John J. Donohue and Peter Siegelman, "The Changing Nature of Employment Discrimination Litigation, 43 Stanford Law Review 983, 1991.

plain of discriminatory firings, rather than about a refusal to hire in the first place. Such ex-employee plaintiffs are disproportionately drawn from the ranks of executives and professionals. These are the people whose lost earnings and personal characteristics make them the best bets for plaintiff lawyers to make the substantial investment needed to challenge in court an employer with its (usually) much greater resources.

Verdicts in employment litigation regularly reach six and even seven figures. The prospect of such awards does serve as a deterrent to improper management decisions (though sometimes a source of unduly defensive personnel practices). The overall pattern of jury awards does, however, display a rather lottery-like response to the harms inflicted on individual employees.

The administrative procedures and remedies used to enforce workplace laws vary widely, involve multiple agencies from different departments of the federal government, and are administered on a stand-alone basis with little or no regard for overlap or conflicting requirements.

The number of employment suits in federal courts increased by 430 percent between 1971 and 1991. Another 10,000 cases charging unlawful discharge are filed annually in state courts.

The EEOC handles approximately 90,000 complaints per year, compared to 56,000 in 1980.

Access to legal relief through the courts is limited for the majority of employees whose earnings are too low to cope with the high costs and contingency fee requirements of private lawyers.

5. Private Dispute Resolution Alternatives

Two broad approaches have been suggested for reforming the current mechanism for implementing employment law: private alternatives for dispute resolution (ADR), and more coordinated administrative regulation, perhaps capped by a single labor and employment court with jurisdiction over the broad array of legal rules described earlier. The private alternatives are discussed in this section and the administrative and judicial options are taken up in the next section.

The option that attracted the most attention and debate before the Commission was private resolution of public law disputes in the employment relationship. This approach is commonly labeled alternative dispute resolution (ADR). ADR can take on a variety of forms including informal problem solving processes, peer review panels, ombudsman systems, grievance procedures, mini-trial, mediation, and arbitration.

Practitioners of ADR suggest that these procedures work best when integrated into a system that begins with effective organizational policies and practices that limit occurrence of problems before they arise, provides informal processes for individual and group problem-solving of issues or conflicts that do arise, and includes formal appeal and dispute resolution procedures.[10] In turn, for these internal procedures to be used to full advantage, they need to have the necessary due process features. Moreover, neutrals who resolve claims within these systems need to have sufficient substantive expertise to warrant deference to their decisions by the public agencies and courts responsible for the laws involved. Finally, most experts in dispute resolution stress the importance of involving the parties covered by the system in its design and oversight.[11]

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[10] Douglas S. McDowell, Alternative Dispute Resolution Techniques: Options and Guidelines to Meet Your Company's Needs. Washington, D.C.: The Employment Policy Foundation, 1993.

A. Mediation

Under "mediation" the parties try to settle their dispute voluntarily, but with the assistance of a third party who serves as a channel of communication and advice about mutually acceptable resolution of the issues. Ultimately, though, each side retains the prerogative to reject a proposed settlement and proceed to litigation. Under "arbitration," by contrast, the parties agree that their legal dispute will be authoritatively resolved by a private person whom they have jointly selected, rather than pursued to the courts for a jury trial. A third option, fact-finding with or without recommendation or non-binding arbitration, is a blend of the two: the parties submit their cases to a third party who gives them a written decision, but a decision that each has the option of rejecting and going off to court (subject perhaps, to certain sanctions if their case does not fare so well in court).

Mediation, if successful, is advantageous to both sides. They get firm resolution of their legal conflict without the expense and delay of protracted litigation, and on terms that the parties themselves control, rather than being subject to the judgment of an outside tribunal applying public law. Mediators often provide real assistance in settlement negotiations by facilitating private conversations that explore the zone for a "win-win" consensus among the two sides. These potential gains are the reason the EEOC and the Department of Labor have been experimenting with mediation of employment law suits.[12]

One difficulty with mandating mediation -- whether by legal directive or at the option of either side -- is that if this process does not succeed in resolving the dispute, additional time and money will have to be expended by the parties who still must go to court to get a binding decision. There is good reason to believe that mediation would be a valuable tool for resolving certain disputes: it benefits not just the immediate parties, but also the agency burdened with a large and fast-growing caseload, and thence other parties who are at the back of the agency's long line. To be cost-effective, mediation of legal disputes should occur at a key point in the litigation process. The parties should be far enough along that they have discovered what they need to know to make an intelligent judgment about how to resolve the matter voluntarily. They should not have gone so far, though, that almost all of the pre-trial costs have been incurred and the parties are either committed to going to trial or are ready to settle themselves, without outside intervention.

Since the most propitious time can vary considerably from case to case, another possible option is for the agency to assemble a group of seasoned outsiders who can offer those parties who want it some expert and reliable advice about where they could reasonably compromise from their original positions. If settlement negotiations still fail, the parties could be assured that what the mediator has learned from them would not figure in the agency's decision about whether to file charges or a law suit.

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[11] See, for example, William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, Getting Disputes Resolved, San Francisco: Jossey Bass, 1988, p. 65.

[12] Report to the Secretary of Labor on the Philadelphia ADR Pilot Project (October 1992), and Marilynn L. Schyyler, A Cost Analysis of the Department of Labor's Philadelphia ADR Pilot Project, August 1993.

B. Arbitration

Arbitration, by contrast, produces a final and binding adjudication of the employment dispute. If the dispute poses complicated questions of fact or law, the arbitration proceeding will require a hearing at which both sides are represented by legal counsel or other experienced advocate. By comparison with litigation in court, arbitration can secure considerable savings in both the time and money that must be expended for such authoritative legal resolution.[13] Arbitration entails much less paperwork, preliminary depositions and motions, and post-hearing briefs and appeals than does the winding path to and from the courthouse. Equally important, the arbitration hearing is scheduled at a time convenient for the parties and the person they have picked to decide their case, rather than placed at the end of a long line of cases filling the dockets of the court or agency responsible. For a smaller expenditure than going to court, the parties entrust their fate to a decision-maker whose previous track record they knew about and whom they decided to use, rather than a jury for whom this is usually the first and last legal experience.

1. Grievance Arbitration in Union Settings

While arbitration has had a long history in commercial contract disputes, its appearance in the workplace in substantial volume post-dates the National Labor Relations Act of 1935. In almost every industry, unions and employers have negotiated into their collective agreements a system of grievance arbitration to resolve disputes about how their contract provisions should be interpreted and applied. (This labor-management innovation took place in a legal and industrial relations environment in which the likely alternative to arbitration was a strike or lockout, not a lawsuit.)

Grievance arbitration developed under collective bargaining meets many of the requirements of effective dispute resolution system design. It is a voluntary system adopted through negotiation to fit the particular circumstances of the different employment settings and therefore builds participation of the parties into its design, administration, evaluation, and modification. It rests on a foundation of day-to-day interaction among workers, union stewards, and first line supervisors where the vast majority of problems are resolved informally without ever entering the formal procedure. It allows for the parties to reach settlements at multiple steps in the process up to and sometimes during the arbitration hearings. Arbitrators, chosen by the parties for their specialized knowledge and expertise in labor relations, are limited to interpreting the parties' rights under the contract and therefore cannot expand or reduce the substantive rights of either party.

By 1960, the system of grievance arbitration was so widespread in collective bargaining and had achieved such a high degree of confidence that the Supreme Court, in three casesthat became known as the "Steelworkers' Trilogy," gave strong judicial endorsement to the labor arbitrator's jurisdiction and final say about a labor contract. The effect of these three decisions was that the court would defer to arbitrators' awards on nearly all substantive questions and only review arbitration decisions for procedural or due process irregularities.

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[13] For illustrations of arbitration of legal disputes outside the employment field, see U.S. General Accounting Office, Securities Arbitration: How Investors Fare, 1992, and U.S. General Accounting Office, Medical Malpractice: Few Claims Resolved Through Michigan's Voluntary Arbitration Program, 1990.

Grievance arbitration has proven to be a flexible instrument that has, from time to time over its long history, been combined with other dispute resolution techniques to enhance its effectiveness and lower its costs. For example, labor and management have sometimes used mediation of grievances to increase the number of cases resolved prior to arbitration. Between 1980 and 1992, the Mediation Research and Education Project at Northwestern University Law School, a non-profit organization that conducts grievance mediation, reports that of the 2,220 cases it handled, 82.6 percent were resolved through mediation. The average cost for the mediator in 1990 to 1992 was $393 per case, compared to an average arbitrator's fee during this time of approximately $1,800.[14]

2. Grievance Arbitration in Nonunion Settings

Some nonunion firms have also adopted forms of grievance arbitration. A recent study[15] found that 45 percent of large nonunion firms had some form of employee grievance procedure, versus 98 percent in all unionized firms. In the nonunion setting, senior management usually made the final judgment about whether to uphold or reverse the personnel decision being challenged by an employee (whereas in unionized firms, final authority is lodged in a neutral arbitrator selected by both sides). The study also found that nonunion employees faced significant risks in their future prospects with the firm if they took issue with their supervisor's action through such a review process.

Shortly after the Steelworker Trilogy rulings came the surge in employment legislation and regulation. Unlike the collective agreement, these laws created public rights that could not be waived or altered by private agreement, and they entrusted interpretation and enforcement of the law's terms to a body selected by and accountable to the broader community, not the parties to an immediate dispute. Thus, in the early 1970s, the Supreme Court ruled (in Alexander v. Gardner-Denver (1974)) that a unionized employee with a racial discrimination claim was not bound by nor required to have the claim disposed of by the arbitrator under the labor agreement; the employee was free, instead, to pursue the case in federal court. That refusal to defer to the collectively bargained system was applied by the Court to other civil rights laws (Section 1983 in McDonald v. City of West Branch, 1984) and to employment legislation generally (to the FLSA in Barrentine v. Arkansas-Best Freight System (1981)). Since the substantive rights established by public statutes could not be waived or altered by private agreement, the Court was concerned about entrusting administration of legal claims of individual employees to a grievance procedure negotiated by employers and by unions and to private arbitrators whose jurisdiction and experience was primarily based on the interpretation of labor agreements.

3. Arbitration Under Individual Employment Agreements

By the early 1990s, sentiment had begun to change about the virtues of the ADR alternative to litigation. Thus, in the 1991

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[14] Data provided to the Commission by Professor Stephen B. Goldberg, the Mediation Research and Education Project, Northwestern University Law School, 1994. The arbitrator's fee is based on Federal Mediation and Conciliation Service data. See Stephen B. Goldberg and Jeanne M. Brett, "Grievance Mediation and other Alternatives to Arbitration," Workplace Topics, Vol. 2, July 1992, pp. 102-12.

[15] David Lewin, "Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes," 66 Chicago-Kent Law Review 828, 1990.

Civil Rights Reform Act, the Congress stated:

> "Where appropriate and to the extent authorized by the law, the use of alternative dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts and provisions of Federal Law amended by this law."

That same year, the Supreme Court was confronted (in Gilmer v. Interstate/Johnson Lane Corp. (1991)) with the question whether to require arbitration of a nonunion employee's claim of age discrimination in violation of the ADEA. The Court majority decided to enforce the employee's agreement to arbitrate even such public law disputes, distinguishing Gardner-Denver and other precedents from the union context on the basis that nonunion workers had sole control over their claims and the arbitrator was empowered to address the non-contractual issues.

There is disagreement about the legal scope as well as the policy merits of the Gilmer ruling.[16] What is still up in the air post-Gilmer, is whether the Supreme Court will treat Congress' decision in 1925 to exclude from the FAA all contracts of employees then engaged in interstate commerce as excluding the contracts of all employees who are now potentially subject to Congressional regulation under the present reading of the constitutional commerce clause. Whatever the Court's eventual verdict, a sound judgment about whether it is worthwhile public policy in the 1990s to facilitate arbitration of employment rights cases should not turn on what Congress intended in the 1920s to be an endorsement of arbitration of commercial contract disputes.

The pros and cons of this form of ADR for statutory claims of employees are hotly contested at present.[17] Proponents of arbitration believe that this procedure actually strengthens enforceability of the

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[16] What was distinctive about the case was that the employee worked for a financial services firm and the arbitration clause was contained in his registration agreement with the New York Stock Exchange (NYSE) as a securities representative. Arguably, then, the case did not involve an employment contract. The significance of that fact is that the legal premise for the Supreme Court's ruling was the 1925 Federal Arbitration Act which specifically excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In the 1920s, the judicial interpretation of the Constitution basically limited Congress' jurisdiction under the commerce clause to businesses (and employees) engaged in transportation of goods and services. Now interstate commerce under the Constitution has been read to encompass just about any firm engaged in production and distribution of goods and services.

[17] Besides Professors Clyde Summers, Theodore St. Antoine, and Katherine Stone who testified on this topic, there is a published debate by two other legal scholars who testified before the Commission on other issues: Samuel Estreicher, "Arbitration of Employment Disputes Without Unions," 66 Chicago-Kent Law Review 753 (1990), and Matthew W. Finkin, "Commentary," Id. 799. The limited evidence we have is that arbitrators tend to uphold claims more often than they reject them (see, for example, U.S. General Accounting Office, Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes (March, 1994), and, at least in the medical malpractice context, to favor the plaintiff's case considerably more often than do juries: see Thomas B. Metzloff, "Alternative Dispute Resolution Strategies in Medical Malpractice," 9 Alaska Law Review 429, 1992.

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substantive rights guaranteed by the law, by expanding access for those people whose cases would otherwise not be heard (particularly lower-paid workers with less obvious, but still meritorious, legal claims).

Some experts have expressed misgivings about the type of arbitration system endorsed in the Gilmer case as a model for resolving employment disputes involving public law. Few are concerned about an agreement to use arbitration arrived at by both parties after a dispute has arisen. In this setting the plaintiff (usually a former employee) is advised by a lawyer, and can freely decide that private arbitration is truly preferable to pursuing this particular case in court. The reason arbitration is rarely agreed to at this stage is that the employer and the employee each prefer to take quite different kinds of cases to court.[18] By contrast, the type of pre-dispute arbitration arrangement seen in Gilmer is devised by employers or their associations and presented to newly-hired employees on a "take it or leave it" basis. While the labor market does permit some negotiation and variation in salaries and benefits, it is hardly likely to let employees insist on litigating, rather than arbitrating, future legal disputes with their prospective employers.

The fact that employment arbitration is not a particularly voluntary procedure as far as individual employees are concerned is not a sufficient reason for rejecting this option. The alternative of litigation in court or before an administrative tribunal is hardly voluntary either. The employee-plaintiff has no other option but to expend the time and money needed for legal resolution of a claim of a claim.

A crucial fact, of course, is that it is the employer that unilaterally develops the arbitration procedures that (nonunion) employees are contractually bound to use. That means that important quality standards should be met by such a private procedure before it may be enforced against a plaintiff with a public law claim. As the Supreme Court acknowledged in Gilmer, if Congress or the courts have decided that it is in the public interest to guarantee employees certain fundamental rights, this policy judgement must not be evaded or diluted through private procedures that cannot fairly and effectively address employee claims that their rights have been violated.

Employer representatives who addressed the Commission on this topic accepted this fundamental principle.[19] The difficult practical issue concerns the key safeguards that must be built in to any employment ADR model. Some of the questions regarding these safeguards are listed below.

Bilateral Arbitration

Should the employer also have to commit itself to arbitration of all employment disputes it might have with (former) employees covered by this procedure (e.g., claims of violation of trade secret or noncompete covenants)?

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[18] That is why under Montana's wrongful dismissal statute, even though there are substantial financial incentives to the two sides to agree to arbitration, the vast majority of such cases still go to court: see Leonard Bierman, Karen Vinton, and Stuart A. Youngblood, "Montana's Wrongful discharge from Employment Act: The Views of the Montana Bar," 54 Montana Law Review 367, 1993.

[19] The views of one such witness are elaborated in a recent book, Douglas S. McDowell, Alternative Dispute Resolution Techniques: Options and Guidelines to Meet Your Company's Needs (Employment Policy Foundation: 1993). The written submission by another witness, Charles Bakaly, was essentially to the same effect.

Selection of Arbitrator

Should a neutral arbitrator for each case have to be agreed-to by the individual employee with the claim, or should the employer be entitled to name a roster of arbitrators (or even a permanent umpire) for all claims by its entire workforce? Should some kind of certification of arbitrators handling public law disputes be required from either arbitration associations or the agency responsible for enforcing the legislation in question (e.g., the EEOC for anti-discrimination claims)?

Arbitration Costs

Should the fees and expenses of the arbitrator be borne entirely by the employer, or be divided equally between the two sides, or divided between the parties but with a cap on the employees' share? Should the employer (and possibly the employee) be required to pay the entire cost of arbitration if the other party wins the case?

Arbitration Procedure

Should each side have a right to discovery of relevant documents and to deposition of representatives of the other side, and if so, with any limits to use of such pre-hearing procedures? Should the arbitrator have the authority to issue subpoenas to secure the presence of reluctant witnesses?

Arbitration Decision

Should the arbitrator have the same broad remedial authority as would be available to a court or to an administrative agency hearing this type of employment law dispute? Should the arbitrator be required to issue a written decision containing both detailed findings of fact and explicit analysis of all the relevant legal issues?

Arbitration Rulings

Should arbitration rulings in employment disputes be a matter of public record or kept confidential? Should arbitration rulings be subject to the same right of appeal or judicial review as is normal with trial court or administrative enforcement of the statute in question, or be subject only to the extremely narrow scope of review of grievance arbitration (after the Steelworkers Trilogy)? Should an arbitration verdict unfavorable to an individual employee affect the prerogatives of the public enforcement agency to file and pursue a claim in court about the same dispute?

Participation in Design and Oversight

Should employees have a voice in the design and oversight of the arbitration system? If so, how can this be achieved?

The current debate about the use of private arbitration relates not simply to employer-designed procedures (post-Gilmer), it also requires rethinking employee use of union-negotiated procedures (post-Gardner-Denver). For example:

> Should unions and employers include in their grievance arbitration systems a right of individual employees to secure resolution of legal claims and a directive to the arbitrator to consider them? If this is done by the parties, should union-represented employees be required to use this procedure to dispose of federal law claims? Should they be entitled to use this procedure for state law claims?

C. Internal Workplace Dispute Resolution Procedures

Grievance arbitration procedures under collective bargaining or in most nonunion settings are limited to the scope of issues covered in the bargaining agreement or in the written personnel policies of the company. Yet increasingly, the problems that arise at the workplace involve issues and sometimes involve employees or managers not covered by a bargaining agreement. The increased diversity in the workforce and in workplace issues has led to the adoption of a variety of procedures for handling complaints of any type in organizations. Many of these procedures include a designated professional, often with the (Swedish) title, Ombudsperson, who is responsible for handling and seeking resolution of employee complaints as they arise. As MIT Ombudsperson Mary Rowe pointed out to the Commission:

> "We've been hearing about saving the courts from traditional problems and overload of traditional channels. There are, in addition, peer problems, problems between managers, for example, or between workers, or disputes from managers about harassment by subordinates, as well as the typical labor-management problems you're all used to"

In establishments with union representation, these professionals must work to supplement but not substitute for the established grievance procedures or other informal problem-solving processes between union and employer representatives. In both union and nonunion situations, the role of these professionals is to help apply or to supplement, not to modify or substitute for, existing personnel policies. There are no reliable national estimates of the extensiveness of these procedures, nor are there any systematic studies of their effectiveness. Several analyses have documented, though, that properly functioning internal dispute systems can be cost effective for an organization.[20] Exhibit IV-5 (See page 136) lists some of the features professionals believe need to be built into effective workplace dispute resolution systems.

These internal dispute resolution systems tend to embody multiple options for handling complaints: ranging from informal counseling of the individual on how to deal with the problem or with a fellow employee, to mediation and fact-finding, and in some cases, culminating in binding arbitration.

The existence of multiple options for resolving issues is viewed as especially important for the handling of interpersonal issues such as sexual harassment. The processes used to deal with these issues vary depending on the nature of the complaint, the wishes or willingness of the complainant to pursue the issue through a formal or public process, and the subjective nature of the evidence that is often involved.

The limited amount of published information on these systems makes it hard to evaluate their effectiveness at this point in time or the extent to which those in place embody these design features. While most of these systems appear to provide multiple options, they are paid for, staffed, and managed by the employer. Thus, standing alone, they do not serve as a complete substitute for enforcement of worker rights through recourse to a public agency or the courts.[21] The question, however, is how to build on the features and experiences of these internal dispute resolution systems in ways that integrate the private procedures at the workplace with public agencies and the courts.

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[20] See A.J. Perneski, G. Hall, M. Rowe, J. Ziehgenfuss, and M. Lux, "Perspectives on the Costs and Cost Effectiveness of Ombudsman Programs in Four Fields: Academia, Health Care, Private Companies, and State Government," 15 Journal of Health and Human Resources Administration, Winter, 1993.

[21] Indeed, to the extent that such nonunion grievance procedures involve participation by regular employees, they pose significant questions about their compatibility with the NLRA's ban on employer-established

D. Joint Safety and Health and Other Workplace Committees

Well designed grievance procedures and arbitration models may prove a valuable alternative for resolving the kinds of employment problems that would otherwise be channeled into a lawsuit. These procedures are not, however, well-suited for addressing ongoing problems facing the workplace as a whole: whether it be occupational hazards (under OSHA); the financial viability of the company's pension plan (under ERISA); devising alternatives (including retraining) to mass lay-offs (under WARN); eliminating sexually hostile environments (under Title VII); devising reasonable accommodation to the special needs of disabled workers on the job (under ADA). Implementation of public policies and protections in these spheres has primarily relied on specialized administrative agencies.

Vice President Gore's 1993 Report, Creating a Government That Works Better and Costs Less, underlines the limitations and failings of use of a single centralized agency to monitor and secure compliance with quality standards ordained by public policy for millions of workplaces across the nation.[22] Speaking specifically about OSHA, the Report stated (at p.62):

> "Today 2400 inspectors from OSHA and approved state programs try to insure the safety and health of 93 million workers at 6.2 million worksites. The system doesn't work well enough. There are only enough inspectors to visit even the most hazardous workplaces once every several years and OSHA has the personnel to follow up on only three percent of its inspections."

The Vice President proposed, instead, to draw upon the efforts and insights of those actually on site to figure out ways to make our workplaces safer, fairer and more secure.

Employees, the intended beneficiaries of these public policies, can play a valuable role in enforcing the laws. Properly trained, equipped and organized, employees on the job are in a good position to monitor whether their employers are complying with the government's standards. Working together, employees and managers can also figure out ways of achieving more of these goals at lower costs to their firms and the economy.

That is why joint safety and health committees (JSHCs) are the most common form of employee participation program aimed at employee concerns about conditions of work (as opposed to employer concerns about productivity and quality). A 1993 National Safety Council Report found that JSHCs exist in 75 percent of establishments with 50 or more employees, and in 31 percent with less than 50 employees.[23] Indeed, ten or so states now require by law such a committee (or other forms of em-

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employee representation plans (discussed in Chapter II). Professor Charles Morris, in his presentation to the Commission titled "Deja Vu and 8(a)(2) -- What's Really Being Chilled by Electromation?" April 1994, pointed out that a case now pending before the NLRB, Keeler Brass Automative Group, may produce a Board ruling on precisely this legal issue.

[22] Also see U.S. General Accounting Office, Dislocated Workers: Worker Adjustment and Retraining Notification Act Not Meeting Its Goals, February 1993, documents the particularly egregious failings of WARN, whose notice requirements are complied with by employers less than 30 percent of the time.

ployee involvement in this area). In many of these states the joint committees were legislated with trade-offs involving other provisions of workers' compensation and disability provisions.

What JSHCs do in practice varies significantly from one work site to another. The more effective programs offer technical training to committee members, have regularly scheduled meetings and well-defined internal procedures and responsibilities, conduct periodic on-site inspections to monitor compliance with safety regulations, and recommend (and usually secure) improvements in employer practices and equipment to avoid identifiable hazards. The best such committees are integrated with other employee participation and quality programs. These high-quality JSHCs tend to be found in unionized settings or in larger nonunion firms with a commitment to the advanced human resource techniques described in Chapter II. Union committees, even in small firms, have access to outside technical assistance.

The Commission heard favorable testimony from both business and labor about their experience under the Oregon statute, in particular. (A recent Wall Street Journal article also quoted positive comments from a number of small employers about their experience in Oregon and other states with such laws.) The reasons cited include fewer OSHA inspections and fines, more effective efforts at reducing workplace hazards, and lower workers' compensation costs. (Workers' compensation premiums in Oregon declined by approximately ten percent a year during the first three years, 1991 to 1993, in which its law requiring employee safety and health participation was in effect.) A recent study documents how effective Oregon's new brand of on-the-job safety regulation and administration has proven (in non-union as well as unionized firms).[24] The Commission was also provided with evidence of the considerably longer experience with such "internal responsibility" procedures in Ontario, which shows that higher quality committees lead to lower injury rates for employees.[25]

Private arbitration has served as an effective and flexible process for resolving workplace issues covered under collective bargaining agreements.

The Supreme Court, through the Gilmer decision, has introduced the possibility of an expanded role for arbitration of a wider array of employment law issues. A variety of questions regarding the design of such systems will need to be addressed if arbitration is used to resolve a broader array of employment disputes and is to apply to a broader range of employees.

A wide variety of alternative dispute resolution procedures have arisen in a number of workplaces to deal with issues or individuals not covered by a collective bargaining agreement. These procedures expand the options available for resolving workplace issues.

Safety and health committees are widely used in the U.S. and other countries. Although their effectiveness varies considerably, well designed committees that are supported with adequate training and re-

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[23] Thomas W. Planek and Kenneth P. Kolosh, Survey of Employee Participation in Safety and Health, National Safety Council, October 1993.

[24] David Weil, "The Impact of Safety and Health Requirements on OSHA Enforcement" (April, 1994).

[25] See the submission by the labor and management co-chairs of Ontario's Workplace Health and Safety Agency: Paul K. Forder and Robert D. McMurdo, "Working Together on Health and Safety: The Impact of Joint Health and Safety Committees on Health and Safety Trends in Ontario" (March 1994).

sources and integrated with other organizational policies and practices have demonstrated their effectiveness in improving workplace safety.

6. Integrated Employment Regulation

Shifting disputes from courts (and juries) to private mediation, arbitration, or in-house dispute resolution is just one component of possible institutional reform. Another would be to create a specialized tribunal -- a single employment court -- to handle the entire array of employment (and labor) law disputes.

As the Preface noted, while it is not possible to import an institution found in other countries into the United States it is important to learn from experiences abroad. The task of consolidating the mix of agencies detailed in Exhibit IV-2 would be enormously difficult and take considerable time in view of the diversity of statutes, administrative agencies, rules, and remedial arrangements.

Labor Courts

Most other countries have tribunals that specialize in workplace disputes (see Exhibit IV-6, page 137).[26] Typically, the tribunal is composed not just of professional neutral lawyers, but also of lay representatives of business and labor. The procedures are considerably more informal and relaxed than standard judicial proceedings, and extensive use is made of mediation sessions with the parties. Either the labor court can itself issue immediate injunctive relief when necessary, or it can petition the regular court for such orders that are routinely granted. There has been little systematic study of the impact of the labor court model on comparative costs and effectiveness in enforcing of employment law in these other countries.

The Commission recognizes an important objection that can be raised to the idea of a single employment tribunal. Are not the differences between, for example, civil rights law and occupational safety and health law, or between pension law and collective bargaining law, so deep and complex that it would be a mistake to assume that a single group of judges could develop the necessary experience and sophistication in all these fields? (People who take that position cannot, of course, easily defend the current breadth of federal and state court jurisdiction in this country, not only over employment, but all other fields of law.)

Unified Agency Administration

The Commission does want to highlight for further discussion the question whether there should be more integrated administration of our numerous federal employment statutes, even granting the difficult odds against creation of a single Article III labor court for final adjudication of all such cases. It is important to try to improve resolution of immediate disputes in the employment relationship. However, such disputes should not simply be viewed as isolated events affecting only the immediate claimants. This country needs to develop institutional arrangements that will do a better job of integrating the host of legally distinct programs all trying to influence and reshape different parts of the same employment body.

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[26] Good descriptions of the tribunals and procedures for enforcement of labor and employment in other countries can be found in Benjamin Aaron, "Settlement of Disputes Over Rights," in Comparative Labour Law and Industrial Relations (Roger Blanpain, ed., 1990); Manfred Weiss, Simitis and Rydzy, "The Settlement of Labor Disputes in the Federal Republic of German," in Industrial Conflict Resolution in Market Economies (Tadashi Hanami and Roger Blanpain, eds., 1989); Michel Despax and Jacques Rojot, "Labor Law and Industrial Relations in France," in International Encyclopedia for Labor Law and Industrial Relations (Roger Blanpain, ed., 1987); and Bob Hepple, "Labor Law and Industrial Relations in Great Britain, in International Encyclopedia for Labor Law and Industrial Relations (Roger Blanpain, ed., 1992).

The following are just a few of the questions that one might address from that perspective.

- If the Wage and Hour Division of the Department of Labor discovers that an employer is regularly violating Fair Labor Standards requirements, is that a reason for alerting OSHA about the need to do a sudden and thorough work site inspection to see whether the same management is also endangering the lives and limbs of its workers?[27]

- Since state-appointed tribunals under the federal Unemployment Insurance law now must decide whether an employee was discharged for good reasons and thereby disentitled to UI benefits, could such tribunals also function as the body that awards employees damages against those employers who fire them without good reasons?

- Should the Department of Labor establish a single investigative staff to coordinate enforcement of its extensive body of regulations, and a single adjudicative tribunal for interpretations and enforcement rulings under all these laws?

- Should various agencies that enforce specific employment regulations that are located in different federal departments outside the Department of Labor be included in a single integrated agency responsible for enforcing all employment regulations and resolving employment law disputes?

- Should the judgment about whether to add or delete a new employment regulation or doctrine under one statute be assessed and instituted only as part of a broader process that considers the new rule's interplay with and cumulative impact on other existing (or proposed) employment mandates?

Negotiated Rule Making

Apart from legislative enactment, the promulgation of regulations offers another opportunity to reduce the extent to which workplace problems are resolved without the current level of recourse to regulatory agencies and the courts. Under the Administrative Procedures Act, regulators draft rules, publish them in the Federal Register, hold hearings and receive comments, and then issue the final regulations. The comments often present extreme views of the most interested parties and their versions of the facts. The scene is set for extended litigation on the legislation and what the regulations mean in their finest detail.

Beginning in 1975, the Labor Department began to experiment with negotiated rule-making, under which interested parties were invited to meet with agency officials to present and to discuss various views of the facts and issues.[28] Studies could be agreed upon by mutually respected sources and, with the assistance of a mediation process, a degree of consensus on many facets of the prospective regulations could be reached. Such discourse was designed to concentrate on practical achievement of legislative objectives, rather than on esoteric technicalities. The agency would then issue a draft regulation in the Federal Register for general comment, to be followed by the final rules. The mediation process was designed to produce more understandable and acceptable regulations, within the intent of the legislation, and thereby to reduce subsequent litigation.

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[27] A study in California (released on April 14, 1994), based on random inspections of 69 garment manufacturers and contractors, found that all but two were breaking some federal and state employment laws -- including locked or blocked fire exits and having 13-year-old children working nine hours a day. A Labor Department official was quoted as stating that "this is an industry that ignores the law."

The process has now been fully endorsed and authorized by the Negotiated Rulemaking Act of 1990.[29] Despite the encouragement of this legislation, negotiated rule making has seldom been used in the employment law field (by comparison with environmental regulation). Negotiated rule-making's potential to reduce recourse to state and federal courts and administrative agencies for workplace regulation has yet to be achieved. The Commission needs to understand why so little use has been made of these methods since negotiations appear to be such a natural tool for effective regulation at the workplace. The process, however, requires different attitudes and skills from the parties.

Most other countries resolve employment disputes in a dedicated labor court rather than through the civil court system as in the U.S. A number of experts testified about the merits and limitations of adopting this approach in the U.S.

A number of suggestions were presented to the Commission for integrating some or all of the administrative agencies responsible for different employment laws.

Negotiated rule making has been used effectively but infrequently by the federal government to adapt regulations to fit the modern workplace.

7. General Observations

While the various private and public procedures for resolving disputes were discussed separately in previous sections, experience suggests it is best to view them as interrelated. Thus in considering new approaches to resolving workplace issues it is useful to think in terms of at least the following four stages to an overall system:

(1) the practices used to solve workplace problems before they arise or informally before they enter the formal system;

(2) the options available to resolve disputes privately without involvement of public agencies or the courts;

(3) the administrative processes involved in enforcing the law and resolving disputes; and

(4) the judicial procedures used to review or appeal private and public administrative decisions and rulings.

The last three decades have witnessed an explosion in the breadth and depth of legal regulation of the American workplace.

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[28] "The Limits of Legal Compulsion", U.S. Department of Labor Release, November 12, 1975, Labor Law Journal, February 1976, pp. 67-74.

[29] Public Law 101-648, 101st Congress. See also Administrative Conference of the United States, Negotiated Rulemaking Sourcebook, January 1990.

Federal and state legislatures, courts, and administrative agencies have tried to respond to the social and economic concerns of employees by establishing a host of legal directives telling employers what they must do or they may not do.

The virtue of a legal mandate that offers the employee recourse to a judicial or administrative tribunal is that this provides some assurance that crucial employee interests in a safe, secure, and fair working environment will not be ignored. As we saw from Exhibits IV-1 and IV-2, since the 1970s employees seeking such legal relief have produced a sharp increase in the numbers of suits filed in federal courts and complaints filed with federal agencies.

The workers best able to take advantage of the law are upper-level employees whose claims (usually about their termination) are financially worthwhile to sue about, or groups of employees who have the kind of representation (usually by a union or some other advocacy group) that gets the attention of a short-staffed administrative agency.

Even such limited legal protection comes at a considerable cost. Some of the costs are paid from the public purse that supports the judicial and administrative systems. Much of it comes from the parties themselves who must pay the attorney fees and other expenses of legal proceedings. Some of that cost burden is borne by employers who were guilty of violating the law. As much, if not more, of these legal expenditures are made by law-abiding employers defending themselves against non-meritorious claims and going through all the internal procedures and paperwork needed to demonstrate compliance.

In the longer run most of these employer expenditures are passed on to others -- to governments in the form of lower corporate taxes, to consumers in the form of higher product prices, and to employees in the form of fewer jobs or lower wages and benefits. That means that there is a broad social interest, not just a narrow business interest, in reducing the costs of litigation and regulation.

One such path would take us towards privately-run mechanisms for either resolving individual disputes under the law (e.g., discrimination or wrongful dismissal) or for inspecting and monitoring workplace compliance with regulations (e.g., of OSHA or ERISA).

- With respect to arbitration, the key question is whether and how such a procedure should be designed to ensure it is a fair, as well as a more accessible, alternative to a jury trial.
- With respect to joint safety and health or other such "internal responsibility" programs, should the law require committees or some equivalent from of employee participation, and, if so, how can these programs be designed to fit the diverse workplaces and employment settings found in the economy?
- With respect to either arbitration or self-regulatory committees, the question is whether employment law can safely grant these private procedures some leeway in interpreting and applying public laws to local situations.

For all these questions, the issue is not just whether there are risks and costs to these private alternatives. The more important issue is how these risks and costs of ADR compare with those now being experienced in the administration of employment law by courts and agencies. That, in turn, raises the question about the value of another path towards reform -- more coordinated administration of the array of employment regulations.

8. Summary and Questions for Further Discussion

1. Federal laws governing the workplace increased dramatically since the 1960s. Accompanying this growth in law is a corresponding expansion in the rules and regulations that guide their administration and enforcement. The Labor Department alone is responsible for enforcing a vast number of workplace regulations, and other agencies.

2. At the same time, the American workforce and workplaces have become more diverse, making it difficult for the laws and regulations to fit these changing circumstances. The increased diversity, in turn, created more demand for protective legislation and more complex rules.

3. Workplace litigation caseloads and costs rose faster than other areas of law. Employment cases in the federal courts increased by over 400 percent between 1971 and 1991.

4. Agencies responsible for administering these laws experienced increasing backlogs and delays in processing cases.

5. The private institutions Americans have traditionally relied upon to resolve issues without resort to government regulatins or court litigation, namely collective bargaining grievance arbitration, declined in coverage and were limited in their finality by court decisions.

6. Neither the more longstanding forms of private representation and dispute resolution, i.e., mediation and arbitration, nor the newer more informal employee participation and alternative dispute resolution systems, are being utilized to their full potential for dealing with issues and resolving disputes that now are regulated by law. All of these procedures would need to be modified in various ways if they are to be used as part of a system for adapting workplace regulations to fit different settings and enforce public laws.

7. The administrative procedures for resolving employment cases are complicated by (1) the large number of different agencies, enforcement regimes, and remedies available under the different statutes; and (2) the varying scope of judicial review accorded agency decisions.

8. The U.S. relies on the civil court system to litigate employment disputes while many other countries use specialized, tripartite employment courts.

9. Experience with dispute resolution suggests the value of considering the interrelationships among different levels or stages in the private and public procedures used to resolve workplace issues, including: (1) the informal practices and organizational policies designed to solve workplace problems before they arise or to resolve them informally before they enter the formal system; (2) the formal procedures (e.g. arbitration) used to resolves disputes before they are brought to a public agency or the court, (3) the administrative processes involved in enforcing the law and resolving disputes, and (4) the judicial procedures used to review or appeal private and public administrative decisions and rulings.

10. Negotiated rule making has been shown in some instances to improve the efficiency and acceptability of the regulations required to implement and enforce the objectives of laws governing the workplace. However, it has seldom been used for employment issues.

Questions for Further Discussion

1. What changes in current labor and employment arbitration procedures are needed to deal with the broader range of issues and individuals involved in contemporary employment disputes?

2. What is the appropriate relationship between private and public dispute resolution procedures?

3. What role, if any, should employees have in the design and oversight of workplace dispute resolution systems that involve issues of public law?

4. How can worker-management committees or other forms of employee involvement be used to internalize responsibility for or resolve problems of occupational safety and health or other workplace matters regulated by public law?

5. Should the U.S. government integrate and combine different agencies responsible for administering and enforcing employment laws and regulations?

6. Should the U.S. consider establishing a specialized branch of the judicial system to deal with employment law cases?

EXHIBIT IV-1

Description of Major Statutes and Executive Order Comprising the Framework of Federal Workplace Regulation*

STATUTE	DESCRIPTION	PRINCIPAL ENFORCEMENT AGENCY
	LABOR STANDARDS	
FLSA	Establishes minimum wage, overtime pay and child labor standards.[a]	Labor-WHD
Davis-Bacon Act	Provides for payment of prevailing local wages and fringe benefits to laborers and mechanics employed by contractors and subcontractors on federal contracts for construction, alteration, repair, painting or decorating of public buildings or public works.	Labor-WHD
Service Contract Act	Provides for minimum compensation and safety and health standards for employees of contractors and subcontractors providing services under federal contracts.	Labor-WHD
Walsh-Healy Act	Provides for labor standards, including wage and hour, for employees working on federal contracts for the manufacturing or furnishing of materials, supplies articles, or equipment.	Labor-WHD
CWHSSA	Establishes standards for hours, overtime compensation, and safety for employees working on federal and federally financed contracts and subcontracts.	Labor-WHD
MSPA	Protects migrant and seasonal agricultural employers, agricultural associations, and providers of migrant housing.	Labor-WHD
	BENEFITS	
ERISA	Establishes uniform standards for employees pension and welfare benfit plans, including minimum participation, accrual and vesting requirements, fiduciary responsibilities, reporting and disclosure benefits.	Labor-PWBA[b] PBGC, IRS
COBRA	Provides for continued health care coverage under group health plans for qualified separated workers for up to 18 months.	Labor-PWBA
Unemployment Compensation	Authorizes funding for state unemployment compensation administrations and provides the general framework for the operation of state unemployment insurance programs.	Labor-ETA
FMLA	Entitles employees to take up to 12 weeks of unpaid, job-protected leave each for specified family and medical reasons such as the birth or adoption of a child or an illness in the family.	Labor-WHD
	CIVIL RIGHTS	
Title VII	Prohibits employment or membership discrimination by employers, employment agencies, and unions on the basis of race, color, religion, sex, or national origin; prohibits discrimination in employment against women affected by pregnancy, childbirth or related medical condition.	EEOC

EXHIBIT IV-1 (Continued)

Description of Major Statutes and Executive Order Comprising the Framework of Federal Workplace Regulation*

STATUTE	DESCRIPTION	PRINCIPAL ENFORCEMENT AGENCY
Equal Pay Act	Prohibits discrimination on the basis of sex in the payment of wages.	EEOC
EO 11246	Prohibits discrimination against an employee or applicant for employment on the basis of race, color, religion, sex, or national origin by federal contractors and subcontractors, and requires federal contractors and subcontractors to take affirmative action to ensure that employees and applicants for employment are treated without regard to race, color, religion, sex or national origin.	Labor-OFCCP
ADEA	Prohibits employment discrimination on the basis of age against persons 40 years and older.	EEOC
ADA	Prohibits employment discrimination against individuals with disabilities: requires employer to make "reasonable accommodations" for disabilities unless doing so would cause undue hardship to the employer.	EEOC
Rehabilitation Act (Section 503)	Prohibits discrimination in employment by federal contractors and subcontractors on the basis of disability and requires them to take affirmative action to employ, and advance in employment, individuals with disabilities.	Labor-OFCCP
Anti-retaliatory Protections - STAA	Prohibits the discharge or other discriminatory action against filing a complaint relating to a violation of a commercial motor vehicle safety rule or regulation or for refusing to operate a vehicle that is in violation of a federal rule, or because of a fear of serious injury due to an unsafe condition.	Labor-OSHA[h]
	Occupational Health and Safety	
OSHA	Requires employers to furnish each employee with work and a workplace free from recognized hazards that can cause death or serious physical harm.	OSHA
MSHA	Sets health and safety standards and requirements to protect miners.	MSHA[i]
Drug Free Workplace Act	Requires recipients of federal grants and contracts to take certain steps to maintain a drug free workplace.	OFCCP
	Labor Relations	
NLRA	Protects certain rights of workers including the right to organize and bargain collectively through representation of their own choice.	NLRB[j]
LMRDA	Requires the reporting and disclosure of certain financial and administrative practices of labor organizations and employers; establishes certain rights for members of labor organizations and im-	NLRB

EXHIBIT IV-1 (Continued)

Description of Major Statutes and Executive Order Comprising the Framework of Federal Workplace Regulation*

STATUTE	DESCRIPTION	PRINCIPAL ENFORCEMENT AGENCY
	poses other requirements on labor organizations.	
Railway Labor Act	Sets out the rights and responsibilities of managegent and workers in the rail and airline industries where one employer may provide services in numerous locations simultaneously; provides for negotiation and mediation procedures to settle labor-management disputes.	NMB[k]
	Employment	
Polygraph Protection Act	Prohibits the use of lie detectors for pre-employment screening or during the course of employment.	Labor-WHD
Veterans Reemployment Act	Provides reemployment rights for persons returning from active duty, reserve training, or National Guard duty.	Labor-ETA
IRCA	Prohibits the hiring of illegal alliens and imposes certain duties on employers; protects employment rights of legal aliens; authorizes but limits the use of imported temporary agricultural workers.	Labor-WHD
WARN	Requires employers to provide 60 days advance written notice of a layoff to individual affected employees, local governments, and other parties.	Labor-WHD

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[a] Wage and Hour Division
[b] Pension Welfare Benefit Administration
[c] Pension Benefit Guarantee Corporation
[d] Internal Revenue Service
[e] Employment and Training Administration
[f] Equal Employment Opportunity Commission
[g] Office of Federal Contract Compliance Programs
[h] Occupational Safety and Health Administration
[i] Mine Safety and Health Administration
[j] National Labor Relations Board
[k] National Mediation Board

*Many statutes are complex and contain a multitude of requirements, rights, and remedies. The information presented has been simplified for illustrative purposes.

EXHIBIT IV-2

Procedure, Forum, and Remedy

PROGRAM	AUTHORITY	GROUP CLAIMS	FORUM	INTERIN RELIEF	IN-KIND REMEDY	SCOPE OF COMPENSATION	PUNTIVE DAMAGES	ATTORNEY FEES
Fair Labor Standards Act	Dept.of Labor and Individual Employee	Representative Action	Federal District Jury depends on claims	Secretary Petition Dist. Court	Secretary of Dist. Court Injunction	Back Pay	Double Back Pay Criminal Prosecution	Prevailing Plaintiffs
Family and Medical Leave Act	Dept. of Labor If not Individual Employee	Class Action	State or Federal Court. Jury Trial	Sec.of Labor. Petition Court.	Broad Equitable Relief	Back Pay	No	Prevailing Plaintiffs
Employee Polygraph Protection Act	Sec.of Labor. and Individual Empl.	Class Action	State or Federal Court.	Secretary to Dist.Court.	Broad equitable relief	At large damages	Penalties assessed by Sec. of Labor up to $10,000	Prevailing Party
Occupational Safety and Health Act	OSHA Div. Dept. of Labor	Yes.-OSH Compalint	ALJ to OSHRC to Circ Court	OSHA to Dist.Court.	Abatement	For Retaliatory Actions	Fines- Paid to government	None
Employee Retirement Income Security Act	Dept of Labor Individual Employees	Class Action Rule 23	Federal Court. Some State Court Some Jury Trial	Employee Beneficiaries in Court	Definition & Provision of Benefits	Liquidated Damages to Benefits	Criminal Fines Civil Penalties Some Punitives	Prevailing Plaintiffs: Some Prevailing Defendants

Exhibit IV-2

Procedure, Forum, and Remedy

Program	Authority	Group	Forum Claims	Interim	In-kind Relief	Scope of Remedy sation	Punitive Compen-	Attorney DamagesFees
Age Discrim. Employment Act	Individual -Unless EEOC	Representative with consent sues in time	Federal District Jury of group	EEOC Petition Dist. Court trial	Broad Equitable-	Back pay and Front pay Reinstatement Rare	Double damages-	Prevailing Plaintiffs If willful
Fair Labor Standards Act	Dept. of Labor and Individual	Representative Action Employee	Federal District Jury	Secretary Petition Dist. trial for some claims	Secretary to. Dist. Court Court.	Back Pay Back Pay- Injunction	Double Plaintiffs Prosecution	Prevailing Criminal
Family and Medical Leave Act	Dept. of Labor If not,	Class Action Individual Employee	State or Federal Court	Sec. of Labor Petition Court. Jury Trial	Broad Equitable Relief Relief	Back Pay	No	Prevailing Plaintiffs
Employee Polygraph Protection Act	Dept. of Labor and Individual Empl.	Class Action	State or Federal Court.	Secretary to Dist. Court	Broad Equitable Relief	At large damages Sec. of Labor	Penalties assessed by -up to $10,000	Prevailing Party
Occupational Safety and Health Act	OSHA Div. Dept. of Labor	Yes.-OSH Complaint	ALJ to OSHRC to Cir. Court	OSHA to Dist. Court	Abatement	For Retaliatory Actions government	Fines- Paid to	None
Employee Retirement Income Security Act	Dept. of Labor Individual Employees	Class Action Rule 23 Court	Federal Court. Some State in Court Some Jury	Employee Beneficiaries Benefits in Court Trial	Definition and Provision of Benefits	Liquidated Damages to Benefits.	Criminal Fines Civil Penalties. Some Punitives. Prevailing	Prevailing Plaintiffs: Some Defendants

EXHIBIT IV-3

SELECTED CATEGORIES OF LITIGATION IN THE FEDERAL DISTRICT COURTS

By Cases Filed

Year	Total Civil[1]	Fortune 1000 Plaintiff[2]	Personal Injury[3]	Labor Law[4]	Employment Law[5]
1971	69,465	3,153	20,517	2,430	4,331
1972	72,180	3,396	19,449	2,741	4,635
1973	74,563	3,220	18,520	2,965	4,855
1974	77,347	3,485	18,621	3,311	5,783
1975	87,641	4,139	19,192	4,316	7,638
1976	96,139	4,718	19,161	4,452	10,269
1977	96,829	4,836	19,280	4,305	10,954
1978	103,513	4,495	19,483	4,141	10,709
1979	117,680	4,874	20,630	4,603	11,103
1980	131,533	6,059	22,622	4,368	11,472
1981	139,193	6,044	24,816	4,540	13,134
1982	139,593	7,539	25,801	4,711	15,436
1983	147,518	7,744	27,582	4,669	17,701
1984	152,061	7,855	27,686	4,459	19,166
1985	160,484	8,257	30,294	4,017	18,061
1986	163,664	8,329	29,420	4,242	20,320
1987	159,275	9,709	27,622	3,738	19,950
1988	161,769	9,029	26,760	3,231	20,041
1989	163,865	8,905	26,803	2,920	21,775
1990	156,762	6,637	23,868	2,709	22,165
1991	146,790	6,954	23,959	2,364	22,968
Increase 1971-1991	110%	121%	17%	-3%	430%

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[1] This category excludes the following subcategories of civil litigation: prisoner petitions (i.e., for writs of habeas corpus) student loan recovery cases, deportation cases, local cases in U.S. territories, and personal injury or social security cases in which the U.S. is a defendant.

[2] This category is presented here as proxy for business litigation in general, for which there are no precise figures for the period in question. Fortune 1000 stands for the industrial Fortune 500 and service sector Fortune 500 combined.

[3] This category excludes all asbestos cases because the brief but massive surge in asbestos litigation during the 1980s distorts underlying long term trends.

[4] Labor law covers cases involving the National Labor Relations Act, the Labor Management Reporting and Disclosure Act, and the Railway Labor Act.

EXHIBIT IV-4

TRENDS IN COMPLAINT AND CASE VOLUME: SELECTED EMPLOYMENT STATUTES

	Wage & Hour Complaints	Wage & Hour Cases	OSHA Complaints	OSHA Cases	EEOC Complaints	EEOC Cases
1980	45,366	7,949	16,100	11,988	——	—
1981	46,020	5,752	13,161	6,744	56,228	444
1982	46,584	7,648	6,741	5,978	54,145	241
1983	44,869	3,958	6,361	5,219	66,461	195
1984	50,037	3,989	7,532	4,789	——	—
1985	57,314	3,610	8,663	4,736	——	—
1986	59,988	4,389	9,085	4,808	62,822	526
1987	58,936	3,343	9,764	5,041	62,074	527
1988	62,599	3,357	12,200	5,686	58,853	555
1989	63,965	3,439	11,869	7,702	55,952	598
1990	60,484	3,327	10,850	8,242	62,135	643
1991	54,142	3,041	10,198	8,686	63,898	593
1992	47,879	2,733	10,873	8,646	72,302	446
1993	46,121	2,295	10,539	8,960	87,942	481
Peak Year	1989	1980	1980	1980	1993	1990
% Change 1980-Peak[1]	+41%	0%	0%	0%	+56%	45%
% Change 1980-1993	+2%	-71%	-35%	-25%	+56%	8%

[1] The figures for the EEOC categories are from 1981, sin 1980 figures are unavailable.

SOURCE: Joel Rogers and Terence Dunworth, Business Disparity Group.

Exhibit IV-5

Key Features for an Integrated Workplace Dispute Resolution System

An Integrated Workplace Resolution System should:

1. Deal with a very wide spectrum of workplace concerns.
2. Be open to al categories of personnel.
3. Handle group issues as well as individual complaints.
4. Have multiple options or mechanisms including encouraging person-to-person or group-to-group negotiations and problem resolution; informal or formal mediation fact finding, and peer review, and; arbitration.
5. Allow "looping backward and forward" to the informal and formal procedures at various stages in the resolution process.
6. Provide a variety of helping resources such as training, advising, and representation not only to the complaint but also to the respondent and the supervisors and coworkers affected by the dispute.
7. Include people of color, women, and men in the various roles in the system.
8. Be taught to all participants in the organization.
9. Proscribe reprisal and provide for monitoring and evaluation.
10. Include a wide cross section of employees and managers in the design of the system.

Source: Testimony of Professor Mary Rowe, April 6, 1994

EXHIBIT IV-6

	GERMANY	***FRANCE***	***UNITED KINGDOM***
General Structure:	The labor court system is three tiered: labor courts of first instance, appellate courts, and a federal labor court, with judicial review by the Constitutional court.	Labor and employment issues may be decided in a number of courts, yet the major venue for these cases is the Conseil des Prud'hommes. There is one labor court in every district where there is a regular first echelon Civil Court.	Industrial tribunals cover most of the individual employment disputes, and an Employment Appeals Tribunal presides over appeals from the industrial tribunals (subject to judicial review).
Panels:	Composed of a professional judge and two wingers - lay judges, with an equal vote, one representing labor and the other business.	The counsellers are not professional judges, but rather representatives of the employees and employers, elected directly by their peers. Elections of representatives for the Conseils are local in nature.	The industrial panel is composed of a professional chairperson appointed by the Secretary of State and two lay-members appointed through consultation with labor and business associations.
Jurisdiction:	Labor courts have exclusive jurisdiction over virtually all private legal industrial conflicts including both collective and individual disputes. Excluded from the court's jurisdiction are most disputes over co-determination, and the internal organization of unions and employers' associations.	The Conseils have jurisdiction only over individual disputes. On these matters they are the first and last instance, with almost no appeal possible.	The tribunals are in charge of individual employment disputes. Collective disputes are resolved through voluntary measures, and under some circumstances in the regular courts.
Procedure:	Compared to the regular German court system, procedures are relaxed and conciliatory. The chair is authorized to summon all witnesses, experts, and documents which he views as necessary for the completion of the trial in one day. Judgment must be pronounced immediately following the proceedings.	Cases always start before the board of conciliation and only if unsuccessful are transferred to the board of judgment or to counsellers-recorders who serve as fact-finders who later present the case before the board of judgment. Procedures are generally informal and extremely fast, with most cases completed within the same day and with a short waiting period.	Complicated pleading procedures are avoided, rules of evidence relaxed, with no compulsory legal representation. The Advisory Conciliation and Arbitration Services (ACAS) promotes ADR for resolving all employment related disputes, including provision of collective conciliation, conciliation in proceedings before the tribunals, and reference to arbitration and mediation.
Remedial power:	Injunctions are issued by the labor court itself. In addition, the court has full remedial power.	The court has broad injunctive and remedial authority.	The tribunals have limited remedial power, and cannot issue interim injunctions, not enforce compliance with their own judgments.

Chapter V

General Observations

Several common themes emerged in the testimony and the evidence presented to the Commission, beyond the three separate questions raised in the Mission Statement discussed in the previous three chapters. This brief chapter summarizes several of these themes which need to be recognized when addressing the issues considered in the individual chapters.

1. Growing Diversity in Worker-Management Relations

Chapter I reported the wide variety of employment relations found in firms of different sizes and in different industries. Earnings have become more unequally distributed in recent years, separating those with and without the education, training, and ability to use modern technologies and to participate effectively in workplace problem-solving. This raises the question of whether the American workforce is adequately prepared to meet the demands of international and domestic competition, changing technologies, and new patterns of work organization that put a premium on education, skill, and problem-solving abilities. The move away from the stereotypical model of a male wage earner in a stable long term job with a wife and family at home poses the question of whether existing private and public policies are flexible enough to fit the diverse workforce and circumstances encountered in the contemporary labor market.

Diversity characterizes the distribution of human resource policies and practices of employers and labor organizations. Chapter II, for example, focused on the innovative practices found in many firms that provide employees a voice in decisions that affect their jobs and the performance of their enterprises. American employers have been world leaders in introducing some of these workplace innovations. Some American firms have served as benchmarks for employers around the world, while others have learned from the practices of leading firms in other countries. These innovations are helping

American employers be competitive on world markets. A number of unions have initiated broad ranging partnerships with employers that extend from the workplace to the highest levels of decision-making in an effort to enhance both enterprise performance and democracy at the workplace. Chapters III and IV showed that the diversity reported in Chapter I has contributed to the inability of government regulators to enforce the laws governing individual and collective worker rights. The variation and complexity in administrative and enforcement procedures and penalties add significant costs to the workplace and divert time and resources to litigation that could be more effectively put to use in preventing problems from arising, resolving disputes quickly and close to their source and making the promised rights accessible to their intended beneficiaries. This leads to the question of whether alternative dispute resolution techniques, mediation, and arbitration can be utilized to provide better tailored approaches to workplace dispute resolution; the issue also arises whether the present methods of determining regulations and administering them can be improved.

2. Interdependence of Issues Presented to the Commission

A diverse workforce requires variation in methods and procedures for employee participation, representation, and dispute resolution. Sustained labor-management cooperation requires acceptance of labor representatives as valued partners in existing worksites under collective bargaining and respect for workers' rights to choose whether or not to be represented in new facilities. Cooperation cannot be sustained in an environment of bitter, prolonged, and inflammatory debates over the process of worker representation. Collective bargaining relationships that follow long battles over union recognition cannot be easily transformed into cooperative and highly participative workplaces.

Alternative dispute resolution procedures cannot take on a broader role at the workplace in enforcing workplace justice unless the parties affected participate in both the design and oversight of the system.

The issues and the parties to the workplace no longer fit the traditional labels of "worker" versus "supervisor" or "manager," or "exempt" versus "nonexempt." The issues of concern in the modern workplace transcend those covered by a traditional collective bargaining contract. Thus, participation in the design and oversight of workplace dispute resolution must also transcend these traditional labels and boundaries between employee groups.

The success of any formal dispute resolution system requires effective workplace policies and institutions that both prevent problems from arising in the first place and resolve as many as possible informally before they escalate into formal complaints or lawsuits. The evidence presented in Chapter II suggests that workplaces that have been successful in developing the trust needed to foster and sustain employee participation and cooperation are more likely to have these types of policies and the capability to resolve those problems that do arise. The question is whether it is possible to take advantage of existing labor-management relationships and employee participation processes to fulfill some of these workplace justice roles.

3. Mismatch of Policy and Practice

The evidence presented to the Commission reflected a degree of mismatch between some aspects of the legal framework regulating worker-management relations and the emerging workplace and workplace practices necessary to be competitive and to meet workers' needs in the modern economy.

Chapter II reported how some of the more advanced forms of employee participation are put under some uncertainty by interpretations of the National Labor Relations Act. Chapter III documented the obstacles some employees experience in exercising their right to choose whether or not to be represented and to bargain collectively if faced with determined employer opposition. Chapter IV described the growth in regulatory burdens on the workplace and the exploding levels of litigation related to statutes and regulations that workers and employers find hard to use or manage because of their high costs, long delays, and unresponsiveness to non-standard employment relationships. The mismatch between law and practice may grow in the future given the trends of increased international and domestic competition, technological innovation, rising education levels and growing labor force diversity.

4. De-escalation of Workplace Conflicts

The agreement of management and labor on the principle that workers should have the right freely to choose whether or not to be represented by a union and the cooperative labor-management relations found in many settings conflicts with the confrontational process of union organizing and management campaigning to prevent organization that takes place in many other situations. The latter is what was referred to as the "dark side" of labor relations in Chapter III. Caught in the midst of these conflicts are workers who want a voice on their job but fear the tensions, risks, and adversarial climate that sometimes accompany efforts to exercise those rights. All participants -- employees, management, and unions -- would benefit from reduction in illegal activity and de-escalation of a conflictual process that seems out of place with the demands of many modern workplaces and the needs of workers, their unions, and their employers.

APPENDIX A

Historical Perspective on the Work of the Commission

1. The United States enacted in the past 75 years four major statutes that govern labor-management relations - the Railway Labor Act (1926) now applicable to the railroad and airline industries; the Wagner Act, the National Labor Relations Act, (1935), the Taft-Hartley amendments, Labor-Management Relations Act, (1947), and the Labor-Management Reporting and Disclosure Act (1959).

- The 1926 Railway Labor Act was passed with full agreement of railway managements and railway unions.
- The other three pieces of legislation were enacted in bitter controversy between business and organized labor, in sharply divided partisan political conflict, and each reflected short term antecedents in conflicts in the periods preceding the legislation.

2. The labor law reform attempt on the part of the Carter Administration in 1978 and 1979 ended with passage of legislation in the House but a failure to muster the 60 votes required to break a filibuster in the Senate.

3. In this century, there have been two Congressional Commissions and two extended Congressional Committee hearings, that lasted over several years, that have been influential in developing information that shaped Congressional views and legislation on labor-management relations:

U.S. Industrial Commission, 1898-1901; U.S. Commission on Industrial Relations 1912-1915; the LaFollette Committee, Senate Committee on Education and Labor, 1936-1940; The McClellan Committee, Select Committee, 1957-1960.

- The 1898-1901 Commission was comprised of five members of Congress from each body and nine private citizens appointed by the President with a large technical staff. The Commission submitted 19 volumes of materials, ten of which related to the problems of labor, and the Commission also submitted recommendations. The substantive content of the volumes rather than the recommendations were noteworthy.[1]
- The 1912-1915 Commission was comprised of three representatives of organized labor, three of employers, and three public members. Frank P. Walsh was named chairman; Professor John R. Commons of Wisconsin was also a public member. The work of the Commission was carried on both by public hearings and by research reports done by a large and distinguished staff. The Commission held 154 days of hearings in which 740 witnesses testified. The final report consisted of 11 volumes with 253 pages of recommendations.[2]
- The extensive hearings conducted by Senator McClellan, 1957-60, detailed the influence of organized crime in some unions, the abuse of some union officers of their members and finances

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[1] Mark Perlman, Labor Union Theories in America, Background and Development, Evanston, IL, Row, Peterson and Company, 1958, pp. 264-79.

[2] Mark Perlman, pp. 279-301.

and improper conduct of some management representatives. The Committee produced 46,150 pages of testimony, heard 1,525 witnesses and employed 104 staffers at its peak.

4. There have been two occasions in the past 75 years in which Presidents of the United States, after World War I and World War II, have assembled labor and management representatives in formal conferences to seek a consensus on vital issues of post-war labor-management relations. Organized labor and the business community had supported the government in wartime, and business and labor had worked cooperatively with government agencies in the wartime for full production and resolution of disputes.

- President Wilson called an industrial conference that convened in October 1919 with 50 representatives drawn from organized labor, business and public members. The main difference arose on a resolution on collective bargaining in which employers would only endorse collective bargaining unless at the same time the resolution endorsed shop councils and similar organizations, outside of unions. No agreement was possible between these views.

- President Truman opened the Labor-Management Conference on November 5, 1945. It was designed in part to seek agreement on a reconversion policy - from wartime to peace and from wage controls to free bargaining and wage setting. Labor and management were unable to reach agreement. In the view of George Taylor, however "the Labor-Management [conference] of 1945 goes down on the books as the session where American industry formally accepted collective bargaining in principle." The Conference did agree on a few matters, most notably, arbitration as the final step in a grievance procedure under a collective bargaining agreement.

- In commenting on the 1945 Conference, George Taylor who played a role in organizing the Conference, wrote: "Labor-management conferences, both national and regional in scope, can be and should become a standard part of the American industrial-relations pattern."[3]

5. Two Presidents since the end of World War II established ongoing labor-management committees comprised of national leaders of organized labor and business. They met regularly for periods of a year or two.

- President Johnson established a Committee jointly chaired by the Secretary of Labor and Secretary of Commerce in the mid-1960s.

- President Ford established a Committee chaired by the Secretary of Labor that met monthly during 1975. The President met with the Committee for an hour each session.

6. The previous experience outlined above provides some perspective on the scale of the work of the present Commission. It also necessarily raises the question whether a major Congressional Commission is in order and whether a continuing Labor-Management Committee of top level national business and labor representatives is appropriate.

- Previous Commissions have been much more elaborate than the present effort, and Congressional authorization and involvement historically appear to have been a vital ingredient.

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[3] George W. Taylor, Government Regulation of Industrial Relations, New York, Prentice-Hall, Inc., 1948, p. 228.

- Continuing direct discourse between top level national business and labor representatives is essential to changing circumstances and to the long-term adaptation of the public framework for constructive worker-management and labor-management relations in the changing environment described in Chapter I.

- The problems of the workplace confronting workers and their organizations and management are not susceptible to simple or once-and-for-all solutions.

APPENDIX B

NATIONAL MEETINGS--Washington, D.C.

May 24, 1993 -- Initial Meeting

FOCUS: Nature of the American Workforce and Workplace

COMMISSIONERS

John T. Dunlop, Chair[*]
Paul A. Allaire
Douglas A. Fraser
Richard B. Freeman
William B. Gould IV
Thomas A. Kochan
Juanita M. Kreps
F. Ray Marshall
William J. Usery, Jr.
Paula B. Voos

Paul C. Weiler,
Counsel to the Commission

June M. Robinson,
Designated Federal Official

Introduction of Commissioners

REMARKS/PRESENTATIONS

Thomas S. Williamson, Jr.
Solicitor (then nominee)
Department of Labor

Robert A. Shapiro
Associate Solicitor
Legislation & Legal Counsel
Department of Labor

William G. Barron
Acting Commissioner
Bureau of Labor Statistics

Robert B. Reich
Secretary of Labor

Ronald H. Brown
Secretary of Commerce

Chair Dunlop --
Commission Plans & Procedures

JUNE 21, 1993

FOCUS: Presentation on American Workforce and Further Workplace Committee Reports

PRESENTATIONS

William G. Barron
Acting Commissioner
Bureau of Labor Statistics

George L. Stelluto
Associate Commissioner
Office of Compensation & Working Conditions
Bureau of Labor Statistics

Edwin R. Dean
Associate Commissioner
Office of Productivity & Technology
Bureau of Labor Statistics

Everett W. Ehrlich
Special Advisor to the Secretary
Department of Commerce

David C. Cranmer
Associate Director
National Institute of Standards & Technology
Department of Commerce

REPORTS OF COMMISSION WORKING PARTIES

Paul A. Allaire
Workplace Committees

F. Ray Marshall
Foreign Experience

Thomas A. Kochan
Regional Meetings of the Commission

Richard B. Freeman
Focus Groups

William B. Gould IV
Litigation

---

[*] Chair Dunlop presided at all meetings of the Commission held in Washington, D.C.

JULY 28, 1993

FOCUS: Employee Participation Programs

PRESENTATIONS -

Manufacturing Sector

Peter J. Pestillo
Executive Vice President
Corporate Relations
Ford Motor Company

Ernest Lofton
Vice President
United Auto Workers
Director, Ford Department

Health & Safety

Lisa Trussell
Manager, Human Resources
Norpac Foods

Irv Fletcher
President, Oregon, AFL-CIO

Jack Pompei
Administrator, Oregon OSHA
Oregon Occupational Safety & Health
Division

Harry Featherstone
CEO & Chairman
The Will-Burt Company

Services Sector -- Small Enterprise

Cheryl Womack
CEO
VCW, Inc.

Michael Howe
Human Resources Officer
Healthspan Corporation

Betty Bednarczyk
Local 113
Service Employees International Union

Vickie Cloud (and Others)
Personnel Division Administration
Federal Express Corporation

SEPTEMBER 15, 1993

FOCUS: Workplace Committees & Employment Involvement

PRESENTATIONS -

Manufacturing Sector

Ronald Doerr
President & CEO
National Steel

Lynn Williams
President,
United Steelworkers of America

Harry Lester
Director, District 29
United Steelworkers of America

Barry W. Davis
Director, District 34 (Retired)
United Steelworkers of America

Services Sector

Morton Bahr
President
Communications Workers of America

William K. Ketchum
Vice President, Labor Relations
AT&T

Tunja Gardner
Sprint Employee Network
Representative/CWA

Juan Castillo
Supervisor, Atlanta Mini-Computer
Maintenance & Operations Center
MMOC/AT&T

Bill Cosens
Communications Technician
MMOC/CWA

Kathi Bond
Communications Technician

John P. Nee
Vice President
Scott Paper Company

Donald L. Langham
International Vice President & Regional Director
United Paperworkers International Union, AFL-CIO

Robert J. Reid
Chief Legal Officer
TOYOTA

PRESENTATION/DISCUSSION OF LESSONS LEARNED

Jerome M. Rosow
President
Work in America Institute

OCTOBER 20, 1993

FOCUS: Issues Under the Railway Labor Act

PRESENTATIONS -

Patrick Cleary
Member,
National Mediation Board

William Gill
Executive Director,
National Mediation Board

Panel I

Walter J. Shea
President,
Transportation Trades Department, AFL-CIO

Airline Labor Panel

Captain J. Randolph Babbitt
President
Airline Pilots Association

John F. Peterpaul
Vice President
International Association of Machinists

Marvin Griswold
Director, Airline Division
International Brotherhood of Teamsters

Nancy Segal
Attorney
American Flight Attendants

David Borer
Director, Collective Bargaining Department
American Flight Attendants

Rail Labor Panel

James M. Brunkenhoefer
National Legislative Director
United Transportation Union

Donald C. Buchanan
Director of Railroad Division
Sheet Metal Workers' International Association

Mark Filipovic
Railroad Coordinator
International Association of Machinists

Ronald P. McLaughlin
President
Brotherhood of Locomotive Engineers

Joel Parker
International Vice President
Transportation-Communications
International Union

Panel II

Charles I. Hopkins, Jr.
Chairman
National Railway Labor Conference

Edwin L. Harper
President & CEO
Association of American Railroads

Panel III

Robert J. DeLucia
Vice President
General Counsel & Treasurer
Airline Industrial Relations Conference

Panel IV

Victoria Frankovich
President
Independent Federation of Flight
Attendants

Alice Saylor
General Attorney & Director
of Public Relations
Transtar, Inc. (for)
Regional Railroads of America

Captain Robert M. Miller
President
Independent Pilots Association

NOVEMBER 8, 1993

FOCUS: Issue of Organization and Representation for Collective Bargaining

PRESENTATIONS

Lane Kirkland
President
American Federation of Labor - Congress
of Industrial Organizations

Jerry Jasinowski
President
National Association of Manufacturers

William D. Marohn
President & CEO
Whirlpool Corporation

Bruce Carswell
Senior Vice President
GTE Corporation
Chairman, Board of Directors
Labor Policy Association

Howard V. Knicely
Executive Vice President
TRW and
Vice Chairman, Board of Directors
Labor Policy Association

Clifford J. Ehrlich
Senior Vice President of Human Resources
Marriott Corporation

Charles F. Nielson
Vice President of Human Resources
Texas Instruments

DECEMBER 15, 1993

FOCUS: Issues of Organization & Collective Bargaining, continued.

PRESENTATIONS

William Stone
Chairman & CEO
Louisville Plate Glass and
Chairman, Labor Relations Committee
U.S. Chamber of Commerce

Diane M. Orlowski
President
JFD Tube & Coil Products, Inc.

Wendy Lechner
Research Director
National Federation of Independent
Businesses

Karen Nussbaum
Director, Women's Bureau
U.S. Department of Labor

John J. Sweeney
President
Service Employee's International Union,
AFL-CIO

Robert A. Georgine
President
Building & Construction Trades
Department, AFL-CIO

Albert Shanker
President
American Federation of Teachers and
Chairman of the Board
Department of Professional Employees,
AFL-CIO

John D. Ong
CEO
B.F. Goodrich Company and
Chairman
The Business Roundtable

JANUARY 19, 1994

FOCUS: The Legal Framework of Workplace Employee Participation Plans

PRESENTATIONS

Views of Management and Labor Organizations

Daniel V. Yager
Assistant General Counsel
Labor Policy Association

Howard V. Knicely
Executive Vice President of
Human Resources, Communications
and Information Sources
TRW

Judith Scott
General Counsel
International Brotherhood of Teamsters

Larry Cohen
Organizing Director
Communications Workers of America

PRESENTATIONS

Perspectives of research & Academic Lawyers

Richard A. Beaumont
President
Organization Resources Counselors, Inc.

Eileen Applebaum
Associate Research Director
Economic Policy Institute

David Brody
Associate
Institute of Industrial Relations and
Professor Emeritus of History
University of California at Berkeley

Samuel Estreicher
Professor of Law
New York University School of Law

Joel Rogers
Professor of Law
University of Wisconsin School of Law

Karl Klare
Professor of Law
Northeastern University

FEBRUARY 24, 1994

FOCUS: Procedural and Substantitive Issues of Representation

PRESENTATIONS

Views of Management and Labor Organizations

William J. Kilberg
Gibson, Dunn and Crutcher

Clifford J. Ehrlich
Senior Vice President of Human Resources
Marriott Corporation

Allison Porter
Director, Recruitment & Training
AFL-CIO Organizing Institute

Bruce H. Simon
Cohen, Weiss and Simon

PRESENTATIONS

Reports of Research by Academics

Matthew Finkin
Professor of Law and Professor in Industrial and Labor Relations
University of Illinois College of Law

Jack Getman
Professor of Law
University of Texas School of Law

Henry S. Farber
Professor of Economics
Industrial Relations Section
Princeton University

Jack J. Lawler
Associate Professor of Law and Industrial Relations
Institute of Labor and Industrial Relations
University of Illinois at Urbana-Champaign

MARCH 16, 1994

FOCUS: The Foreign Experience in Labor-Management Relations

Summary of March 14 and 15 Conference on Industrial Evidence

F. Ray Marshall
Commissioner and Convener of Conference

PRESENTATIONS

Experience of Selected Countries

Germany

Wolfgang Streeck
Professor of Sociology
University of Wisconsin and Senior Fellow
Berlin Institute for Advanced Studies

Japan

Hironari Yano
Manager, Yokohama Works
Toshiba Electric

France

Jacque Rojot
Professor and Dean of Industrial Relations and Management
University of Paris I, the Sorbonne

Australia

Bill Kelty
General Secretary of Trade Unions
Australian Council

Bruce Charles Hartnett
Vice President
National Australia Bank and Formerly with ICI Australia

Margaret Gardner
Head of the School of Industrial Relations
Griffith University, Brisbane

Comments on Presentations from Selected Countries

United States of America

Charles F. "Chuck" Nielsen
Vice President, Human Resources
Texas Instruments

Peter Stirling
Vice President, Human Resources
TI Europe and formerly
Personnel Manager, Pfizer Consumer Products
Pfizer, Inc.

Jack Sheinkman
President
Amalgamated Clothing and Textile Workers Union

Thomas F. Flynn
Consultant to the
National Association of Manufacturers and
Organization Resources Counselors, Inc.

APRIL 6, 1994

FOCUS: Alternative Dispute Resolution Litigation and Regulations

PRESENTATIONS

Views of Management and Labor Civil Rights and Civil Liberty Organizations

Charles G. Bakaly, Jr.
Attorney
O'Melvaney and Myers

Douglas S. McDowell
Partner
McGuiness and Williams

Marsha S. Berzon
Attorney
Altshuler, Berzon, Berzon, Nussbaum
and Rubin

Lewis Maltby
Director
National Task Force on Civil Liberties
in the Workplace
American Civil Liberties Union

Mary P. Rowe
Adjunct Professor of Management
Massachusetts Institute of Technology
Designated Neutral and Ombudsperson
Co-founder and former President
The Ombudsman Association

Paul H. Tobias
Attorney
Founder, Plaintiff Employment
Lawyers Association

Pay Equity and Related Issues

Susan Bianchi-Sand
Chair
Council of Presidents

Research Reports by Academics

Clyde Summers
Jefferson B. Fordham
Professor of Law Emeritus
University of Pennsylvania

Katherine Stone
Professor of Law
University of Michigan Law School

Comment

Leroy D. Clark
Professor of Law
Catholic University School of Law

REGIONAL HEARINGS --
Commission Working Parties

SEPTEMBER 22, 1993

Louisville Regional Hearing Centers for the Arts

COMMISSIONERS

John T.Dunlop, Chair
Juanita M. Kreps
Thomas A. Kochan
F. Ray Marshall

REMARKS/PRESENTATIONS

Carol M. Palmore
Secretary of Labor
Commonwealth of Kentucky

David Armstrong
JeffersonCounty Judge/Executive

Jerry Abramson
Mayor
City of Louisville

Panel 1: Community Infrastructure

Laramie L. Leatherman
Greenebaum Doll & McDonald
Vice President
The Gheens Foundation, Inc. and
Chairman Elect
Greater Louisville Chamber of Commerce

Regina M. J. Kyle
President
The Kyle Group
JCPS/Gheens Professional Development
Academy

Patt Todd
Jefferson County Public Schools

Steve Neal
Jefferson County Teacher's Association
Kentuckiana Education & Workforce
Institute

Kathryn Mershon
Vice Chair
Kentuckiana Education & Workforce Institute

Jack Will
Executive Director
Greater Louisville Chamber of Commerce

Panel 2: Innovative Practices in Large Companies

Stephen A. Williams
President & CEO
Alliant Health Systems

Rodney Wolford
President & CEO
California Health Systems
Former CEO, Alliant Health Systems

Ron Gettlefinger
Director
Region 3, United Auto Workers
Ford Motor Company

Tom Ryan
Regional Manager of State Government
Relations
Denver Region

Terry Smith
Employee Relations Manager
Louisville Assembly Plant

Al Kirkpatrick
Director
Industrial Relations
Louisville Gas & Electric Company

Gary W. Klinglesmith
President/Business Manager
Local Union 2100, IBEW

Frank Crowe
Manger, Labor Relations
Philip Morris

Wayne PUrvis
President
16T, BCTW

Panel 3: Innovative Practices in Smaller Companies

Robert Taylor
Dean
College of Business
University of Louisville

George Gendron
Editor-in-Chief
INC. Magazine

Thomas Blades
Plant Manager
Buckhorn, Inc.

Randy Pidcock
President
USWA, Local 15523

Ted Nixon
President & CEO
D.D. Williamson & Co., Inc.

Sherri Schuenemeyer
Manager, Human ResourcesVice
Lantech, Inc.

OCTOBER 13, 1993

East Lansing Regional Hearing
Michigan State University

COMMISSIONERS

Douglas S. Fraser
Thomas A. Kochan
Paula B. Voos

REMARKS/PRESENTATIONS

M. Peter McPherson
President
Michigan State University

Randall Eberts
Executive Director
W.E. Upjohn Institute for Employment Research

Industry and Labor Organizations

Frank Garrison
President
Michigan AFL-CIO

David Zurvalec
Vice President
Industrial Relations, Michigan Manufacturers

Panel 1: Innovations in Worker-Management Relations

Miller Brewing Company and United Auto Workers, Local 2308

Jim Neal
President
UAW Local 2308

Bill "Red" Green
Plant Chairperson
UAW Local 2308

Dennis Puffer
Plant Manager

Ron McClaron
Human Resources Manager

Herman Miller Company

Craig Schrotenboer
Vice President for People Services

Dave Cotter
Rehabilitation Service Team Leader

Donnelly Corporation

Kay Hubbard
Advocate for Human Resource Development

Shelly Appel, Lee Keuvelaar, and
Tony Spalding
PVC Operations Technicians
Johnson Controls and International
Association of Machinists Local 66

Paul Sivanich
Plant Manager

Doug Curler
Shop Committee Chair

Panel 2: Non-traditional Methods of Resolving Dispute Problems

David Hammar
Mead Paper Company

Bill Brower
President
United Paperworkers International
Union, Local 110

Joe Moberg
President
United Paperworkers International
Union, Local 209

Rita Shellenberger
Manager of Diversity
Dow Chemical Company

Janet S. Dillon
Advisor, Diversity, Management, IBM United
States International Business Machines
Corporation

Rochell Habeck
Professor of Counseling, Education
Psychology, and Special Education
Michigan State University

Michael Taubitz
Assistant Director of Occupational Safety,
General Motors Corporation

Panel 3: Legal Issues in Labor-Management Relations

Tom Woodruff
President
Service Employees International Union
District 1199, Columbus, Ohio

Joe Crump
Food and Commercial Workers, Local 951

Gene Holt
Vice President
Graphic, Communications International
Union
Local 577 M

Rita Ernst
International Representative, Amalgamated
Clothng and Textile Workers Union
Midwest Regional Board

Leonard Page
Associate General Counsel
International Union, UAW

Kent Vana
Attorney, Varnum Riddering, Schmidt and
Howlett

Theodore St. Antoine
University of Michigan, Law School

JANUARY 5, 1994

Boston Regional Hearing
Gardner Auditorium, The State House

COMMISSIONERS

John T. Dunlop, Chair
Richard B. Freeman
F. Ray Marshall
Thomas A. Kochan
Paula B. Voos

Paul C. Weiler,
Counsel to the Commission

REMARKS/PRESENTATIONS

IM (Mac) Booth, President & CEO
Polaroid Corporation

Ann G. Leibowitz
Senior Corporate Attorney
Polaroid Corporation

Kenneth B. Krohn, PhD.

Charla Scivally
Polaroid Employee

Honorable Edward M. Kennedy
U.S. Senator
Massachusetts

Anthony Byergo
Attorney

James R. Green
Professor and Director, Labor Studies
University of Massachusetts at Boston

Robert J. Haynes
Secretary-Treasurer
Massachusetts AFL-CIO

Phil Mamber
President, District 2
United Electrical, Radio & Machine Workers of America

George Poulin
International Vice President, Machinists

Ashley Adams
Organizer, Service Employees International Union,
Local 285

Karen O'Donnell
State Representative, Massachusetts

Elly Leaery
UAW, Local 2324, New Directions
National Organizing Committee

Joe Ivey
1993 President
Associated Builders and Contractors, Inc.

Maurice Baskin
General Counsel
Associated Builders and Contractors, Inc.

Henry Fijalkowski
International Representative, UAW

Peter B. Morin
General Counsel
Massachusettts Bay Transportation Authority

George Carlson
Graphics Communications, Local 600M

Ed Clark
Vice President, ACTWU

Steve Early
International Representative, CWA
for Jobs with Justice

Sandy Felder
President and Executive Director
Service Employees International Union, Local 509

Father Edward F. Boyle, S.J.

Donene Williams, HUCTW

Kate Bronfenbrenner
New York State School of Industrial and Labor Relations
Cornell University

Mark Erlich
Business Manager/Financial Secretary
Carpenters Local 40

Nancy Lessin
Senior Staff
Massachusetts Coalition for Occupational
Safety and Health, Safety and Health
Effectiveness Committees

Dave Buck
Economic Democracy Committee
Citizens for Participation in Political Action
(Written submission)

Joseph Dart
President
Massachusetts Building Trades Council
AFL-CIO (written submission)

Dorothy Johnson
Member
United Electrical Radio and Machine
Workers of America (UE), Local 299 at
Circuit-Wise of New Have, CT
(Written Submission)

JANUARY 11, 1994

Southeast Regional Hearing-Atlanta Georgia State University

COMMISSIONERS

William J. Usery, Jr., Presiding
Richard B. Freeman
Thomas A. Kochan
F. Ray Marshall

PRESENTERS

Bruce Kaufman/
Philip A. LaPorte
Site Committee Co-Chairs

Carl Patton
President Georgia State University

Honorable William Campbell
Mayor of Atlanta

Randy Cardoza
Commissioner
Georgia Department of Industry, Trade &
Tourism

David Poythress
Geogia Department of Labor

Donald Ratacjzak
Director
Economic Forecasting Center
Georgia State University

Amanda Hyatt
Chair, Council for Competitive Georgia

Michael McCall
Deputy Executive Director, South Carolina
State Board for Technical Education

Kathy Delancey
Regional Manager
The Alliance for Emplyee Growth and
Development

David Reynolds, Sr.
Vice President for Human
Resources, Georgia-Pacific Corporation

Dorothy Yancey
Georgia Institute of Technology

Jerry Barnes
Assistant Vice President for Labor Relations
BellSouth Telecommunication, Inc.

Gene Russo
Vice President for District 3
Communications Workers of America

Maurice Worth, Sr.
Vice President for Personnel
Delta Airlines

Charles Wilson
Industrial Relations Manager
Reynolds Metals Company

Bill Metchnik
District Business Representative
International Association of Machinists

Carolyn Jackson
Director of Human Resources
Coca-Cola, USA

Ralph Johnson
Director
Center for Labor Education and Research
University of Alabama-Birmingham

Harold McIver
Regional Director
Industrial Union Department, AFL-CIO

Bruce Raynor
Executive Vice President
Southern Regional Director, ACTWU

Hoyt Wheeler
Professor of Management
College of Business Administration
University of South Carolina

Casey Sharpe
Organizing Coordinator
International Brotherhood of Teamsters

Homer L. Eadkins, Jr.
Management Attorney
Ogletree, Deakins, Nash, Smoak & Stewart

Frak Sheehan
Vice President of Industrial Relations
The Bibb Company

JANUARY 27, 1994

San Jose, CA
San Jose McEnery Center

COMMISSIONERS

William J. Usery, Jr., Presiding
Douglas A. Fraser
Thomas A. Kochan

FOCUS:

The Changing Nature of Work in Silicon Valley

Employee Challenges in the Current Employer Context

Changes in the Law

REMARKS/PRESENTATIONS

Doug Henton
Deputy City Manager of San Jose, CA

Pat HIll Hubbard
Senior Vice President
American Electroncs Association

Any Dean
Business Manager
South Bay AFL-CIO Labor Council

Lenny Siegel
Director
Pacific Studies Center

Linda Kimball

Mary Ruth Gross
Institute of Industrial Relations
University of California at Berkeley,

Val Afanasiev
President
Communicatiaons Workers ofAmerica, Local 9409

Romie Manan
Member
United Electrical Workers Electronics

Bill Brill
Co-Chair, Labor Management Committee
Pacific Gas and Electric Co.

Lloyd Williams
Business Manager
United Association Local 393, Plumbers, Steam Fitters and Refrigeration Mechanics Union

Ed Chiera
Consultant
International Association of Machinists

Mr. Manan
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